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No. 10625

United States
Circuit Court of Appeals

For the Ninth Circuit.

ROSE PAPANTONIO, suing in her own behalf as a shareholder of
TRANSAMERICA CORPORATION and in behalf of all other
shareholders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI, AMA-
DEO P. GIANNINI (as Executor of the Last Will and Testa-
ment of Virgil D. Giannini, Deceased), BANK OF AMERICA
NATIONAL TRUST & SAVINGS ASSOCIATION, a national
banking association (as Administrator-With-The-Will-Annexed
of the Estate of John M. Grant, Deceased), GORDON GRAY,
O. D. HAMLIN, T. W. HARRIS, A. P. JACOBS, F. C. STEVE-
NOT, RUSS AVERY, P. A. BRICCA, GEORGE J. DE MARTINI,
W. N. LAGOMARSINO, A. J. SCAMPINI, WILLIAM E.
BLAUER, LEON BOCQUERAZ, E. H. CLARK, CHARLES N.
HAWKINS, W. F. MORRISH, A. J. MOUNT, ALFRED E.
SBARBORO, CHESTER H. LOVELAND, P. C. HALE, JAMES
A. BACIGALUPI, ARMANDO PEDRINI, GEORGE A.
WEBSTER, E. J. NOLAN, C. R. BELL, W. W. GARTHWAITE,
GEORGE N. ARMSBY, LOUIS FERRARI, V. SCIALOJA,
THEODORE M. STUART, HERBERT E. WHITE, CHARLES
DE Y. ELKUS, WILLIAM S. HOELSCHER, CLIFFORD P.
HOFFMAN, C. J. SMITH, VERNON C. WALSTON, AMADEO
P. GIANNINI, L. M. GIANNINI AND CLAIRE GIANNINI
HOFFMAN, transacting business as co-partners under the firm
name and style of WALSTON & CO., and AMADEO P. GIAN-
NINI (as the Executor of the Last Will and Testament of
Virgil D. Giannini, a deceased member of said co-partnership),
WALSTON & CO., a co-partnership and TRANSAMERICA
CORPORATION, a corporation,


Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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of the Estate of John M. Grant, Deceased), GORDON GRAY,
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HOFFMAN, transacting business as co-partners under the firm
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NINI (as the Executor of the Last Will and Testament of
Virgil D. Giannini, a deceased member of said co-partnership),
WALSTON & CO., a co-partnership and TRANSAMERICA
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Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

ROSE PAPANTONIO, suing on behalf of herself and all other stockholders of Transamerica Corporation, similarly situated, who may join in this action and contribute to the expense thereof,
Plaintiff,

Against

AMADEO P. GIANNINI, L. M. GIANNINI, JOHN M. GRANT, GORDON GRAY, O. D. HAMLIN, T. W. HARRIS, A. P. JACOBS, F. G. STEVENOT, J. RUSS AVERY, P. A. BRICCA, GEORGE J. DE MARTINI, W. N. LAGOMARSINI, A. J. SCAMPINI, WILLIAM E. BLAUER, LEON BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F. MORRISH, A. J. MOUNT, ALFRED E. SPARBORO, CHESTER H. LOVELAND, BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, CHARLES DE Y. ELKUS, WILLIAM S. HOELSCHER, CLIFFORD P. HOFFMAN, C. J. SMITH and VERNON C. WALSTON, individually and as copartners doing business under the firm name and style of Walston & Co., and TRANSAMERICA CORPORATION,

Defendants.

COMPLAINT

Comes now the above named plaintiff complaining of the above named defendants, and for her com-

plaint alleges upon information and belief except as to paragraphs 1, 5 & 8, which plaintiff alleges upon knowledge, as follows:

1. Plaintiff is and has been a stockholder of the defendant, Transamerica Corporation (hereinafter referred to as "Transamerica"), since 1929, and brings this action on behalf of herself and all other stockholders of said corporation similarly situated who may join in this action and contribute to the expense thereof and for the benefit of Transamerica.

[2]

2. Defendant, Transamerica is a corporation organized and existing under the laws of the State of Delaware and doing business, among other places, in the State of California.

3. Defendant, Bank of America National Trust and Savings Association (hereinafter referred to as Bank of America), is a corporation organized and existing under the laws of the State of California, with a principal office for the transaction of its business in the State of California.

4. Pacific Coast Mortgage Co. Transamerica Service Corporation, California Lands Inc., Capital Co., Bankitaly Company of America, Inter-America Corporation, American Brokerage, Inc., Associated American Distributors Inc., Inter-Continental Corporation, Corporation of America, Bank-america Company, Western States Corporation, Occidental Life Insurance Co., Pacific National Fire Insurance Company, Commercial Holding Corporation, Corporation of America, Transamerica Bank Holding Co. and Transamerica General Corpora-

tion, are corporations which were at all times hereinafter mentioned, wholly owned or virtually wholly owned subsidiaries of Transamerica, and have at all times hereinafter mentioned been dominated and controlled by Transamerica Corporation and by A. P. Giannini, L. M. Giannini and John M. Grant. Bank of America was until in or about July, 1937, a wholly owned subsidiary of Transamerica. Since said date Transamerica has owned approximately thirty per cent. of the stock of said Bank of America. At all the times hereinafter mentioned, said Bank of America has been dominated and controlled by Transamerica and by A. P. Giannini, L. M. Giannini and John M. Grant. [3]

5. The plaintiff resides in and is a citizen of the State of New York.

6. The individual defendants herein are citizens of and reside in the State of California.

7. The jurisdiction of this court depends upon diversity of citizenship.

8. The plaintiff now is and has been a stockholder of Transamerica during all the times when the transactions hereinafter referred to occurred. This action is not a collusive one instituted for the purpose of conferring on a court of the United States jurisdiction of a cause of action of which it would not otherwise have cognizance.

9. The matter in controversy, exclusive of interest and costs, exceeds the sum or value of \$3,000.00.

10. The following defendants were directors of Transamerica during the years indicated:

| | |
|--------------------|--------------|
| Amadeo P. Giannini | 1931 to date |
| L. M. Giannini | 1931 to date |
| John M. Grant | 1932 to date |
| Gordon Gray | 1932 to date |
| O. D. Hamlin | 1932 to date |
| T. W. Harris | 1932 to date |
| A. P. Jacobs | 1932 to date |
| F. G. Stevenot | 1932 to date |
| J. Russ Avery | 1932 to date |
| P. A. Bricca | 1932 to date |

[4]

| | |
|----------------------|-------------------------------|
| George J. De Martini | 1932 to date |
| W. N. Lagomarsino | April, 1933 to date |
| A. J. Scampini | April, 1933 to date |
| W. E. Blauer | 1931 |
| A. E. Sbarboro | 1931 |
| Leon Bocqueraz | 1931 |
| E. H. Clark | 1931 |
| C. N. Hawkins | 1931 |
| W. F. Morrish | 1931 |
| A. J. Mount | 1931 |
| Chester E. Loveland | April, 1932 to April, 1934 |

11. That at all the times hereinafter mentioned, A. P. Giannini, A. H. Giannini, L. M. Giannini and John M. Grant, through stock ownership and otherwise, controlled and dominated the affairs of Transamerica, and by means of such control and domination, selected and named their representatives and nominees as members of the Board of Directors of Transamerica, and directly and indirectly decided and determined the business policies, affairs and personnel of Transamerica and its subsidiaries. Said directors, representatives and nominees during all of said times constituted the entire Board of Directors of Transamerica. By reason of the foregoing, the directors of Transamerica at all times hereinafter mentioned failed

to exercise their independent judgment in the performance of their official duties, and whenever the interests of A. P. Giannini, A. H. Giannini, L. M. Giannini and John M. Grant came into conflict with the interests of Transamerica, said directors [5] fraudulently permitted their official acts and conduct to be dictated by said A. P. Giannini, A. H. Giannini, L. M. Giannini and John M. Grant, as hereinafter more particularly set forth.

12. Transamerica was organized in or about the year 1929. On or about June 6, 1927 Bancitaly Corporation (hereinafter referred to as "Bancitaly"), the predecessor of Transamerica, passed a resolution providing that A. P. Giannini should receive in lieu of salary 5% of the net profits of Bancitaly for each year beginning with January 1, 1927, with a guaranteed minimum of \$100,000 a year. From 1927 on, and over a period of several years, said A. P. Giannini received pursuant to the said resolution over \$5,000,000. which was more than 5% of the actual profits of Bancitaly during the said period. During the said period, the profits of Bancitaly upon which the said 5% was computed as aforesaid, were inflated by various devices, some of which are hereinafter enumerated and described. As a result, said A. P. Giannini received more than \$4,000,000. in excess of the 5% of the actual net profits of Bancitaly. That Transamerica, in 1930, as successor to Bancitaly acquired all of the assets of Bancitaly and assumed all of said company's liabilities.

13. On or about January 20, 1930, there was credited to A. P. Giannini on the books of Bankitaly Company of America, which company was a subsidiary of Transamerica, the sum of \$1,400,000, in connection with the aforesaid 5% arrangement. The sum of \$608,000. was paid to said A. P. Giannini in September, 1931 leaving a balance of some \$791,000 to his credit. When said A. P. Giannini in 1931 demanded the payment of said sum of \$791,000, various counsel for Transamerica advised that payment of this sum [6] would be illegal, and the Board of Directors of Transamerica refused to make such payment. Thereafter and in the latter part of 1931 and 1932, the said A. P. Giannini, A. H. Giannini, L. M. Giannini, and John M. Grant, gained control of Transamerica and of Bankitaly Company of America, and the aforesaid sum of \$791,000 was paid to said A. P. Giannini as follows: \$134,826.58 in 1932; \$132,896.92 in 1933; \$100,596.24 in 1934; \$251,952.03 in 1935; \$65,914.28 in 1936 and the balance of said fund in 1937 and 1938.

14. In or about 1931, said A. P. Giannini had received more than 5% of the actual net profits of Bancitaly earned between 1927 and 1930 and the aforesaid sum of \$791,000 was a balance of credit computed on inflated and fictitious profits. Furthermore, no resolution passed by the Directors of Transamerica authorized the aforesaid payments to said Giannini from 1932 to 1938.

15. The methods and devices, among others, employed by Bancitaly to inflate its profits as aforesaid, were as follows: Bancitaly acquired shares

of Bank of Italy, National Bancitaly, United Bank & Trust Company, Oakland Bank, Bowery & East River Bank and Bank of America, and other securities from its subsidiaries and affiliates at far below their market value, and resold the same to the public at a profit despite the fact that the banks and companies aforementioned could have sold said securities directly to the public and made the profits themselves, and in each case the moneys so received would have had to have been treated as accretions to capital. That the acquisition of such shares and the sale thereof as aforesaid by Bancitaly was contrary to sound and established accounting practice.

16. Bancitaly, Transamerica and their subsidiaries and affiliates, made a practice of charging 6 or 8 [7] per cent of the amount that said companies had invested in stocks of subsidiaries and affiliates as interest. The result of said practice was to increase the apparent book profit of such investments and was contrary to sound and established accounting practice. In the year 1930 alone, the profits of Bancitaly were inflated in this matter by the sum of \$166,714.47.

17. Bancitaly credited itself with a profit of \$36,000,000 on the sale of stock of Bank of America, although in actuality, no such large profit was made because the book profit failed to take into account the fact that said stock was sold pursuant to subscription contracts which provided that Bancitaly, the vendor, agrees to repurchase said stock and refund the purchase price if the subscriber de-

sired to cancel the subscription. In 1929, Bancitaly Company of America listed upon its books a profit of upwards of \$7,000,000. on sales of securities to Commercial Holding Company (the name of said latter company being subsequently changed to Inter-Continental Corporation). Both Commercial Holding Company and Inter-Continental Corporation were wholly owned subsidiaries of Transamerica. The greater part of the so-called profits made on such sales of securities was subsequently reduced by the loss which Commercial Holding Company suffered when it resold said securities and as a result of said loss the aforesaid so called profit did not appear on the consolidated statement of Transamerica and its subsidiaries because of the fact that it was a non-realized profit.

18. Between 1934 and 1937 Transamerica paid approximately \$2,800,000 to Associated American Distributors, Inc. (which company was a wholly owned subsidiary of Inter-Continental Corporation, which was itself a wholly owned subsidiary of Transamerica) which money was used by [8] Associated American Distributors, Inc. for commissions and other expenses in connection with the solicitation of orders for the purchase of the capital stock of Transamerica. Said Associated American Distributors, Inc. entered into contracts with independent dealers and with salesmen employed by it and paid commissions to the said dealers and salesmen for orders obtained, and "in order to encourage retention of the stock so purchased, would pay additional commissions in proportion to the

duration of "placements". Associated American Distributors, Inc. did not solicit orders for the purchase of capital stock held by Transamerica in its Treasury although such solicitation and the sales of such stock would have resulted in profits to Transamerica. The following amounts were paid by Transamerica to Associated American Distributors Inc. for commissions and other expenses as aforesaid: In 1934, \$336,857; in 1935 \$891,202.17; in 1936, \$1,124,724.78; in 1937, \$447,000.

19. That payments made by Transamerica to Associated American Distributors, Inc. as alleged in paragraph "18" hereof, were illegal and improper, and a waste of the assets of Transamerica. That the said payments were made for the profit and gain of A. P. Giannini, A. H. Giannini, L. M. Giannini, and John M. Grant, who made large profits as a result of such purchases and sales of the stock of Transamerica, in amounts unknown to the plaintiff.

20. In 1931, the National Bank Examiners went over the books of Bank of America and required that \$35,000,000 of the assets of said bank be charged off as losses and assets of a doubtful and unsatisfactory character and that they be eliminated from the books of said bank as assets. Despite the requirement of said bank examiners, said assets were not charged off and eliminated from the books of said bank. Said bank entered into three contracts, [9] dated respectively June 26, 1931, December 30, 1931 and February 13, 1932, with Corporation of America (said Bank of America and Cor-

poration of America being then 99.65% owned by Transamerica Bank Holding Company, a wholly owned subsidiary of Transamerica), by the terms of which the Corporation of America agreed to purchase the doubtful and worthless assets condemned by said bank examiners as aforesaid, for \$35,214,000, the buyer pledging these and other assets with the seller as collateral security for the obligation to purchase. In August, 1933 the aforesaid three contracts were assigned by Corporation of America to Transamerica Bank Holding Company (the name of said latter company being changed on April 20, 1935 to Inter-America Corporation). Although the aforesaid contracts were really outright obligations to purchase the aforesaid assets, the transaction was treated on the books of the buyer and the subsequent assignees of the buyer as a contract of guarantee.

21. On or about February 1, 1933, Bank of America sold certain of its charged off assets to Corporation of America, (both corporations being then 99.65% owned by Transamerica), for \$250,000. The said agreement of transfer, dated February 1, 1933, was assigned by Corporation of America to Transamerica General Corporation and thereafter reassigned by Transamerica General Corporation to Transamerica Bank Holding Company for the same consideration. Transamerica General Corporation and Transamerica Bank Holding Company were both wholly owned subsidiaries of Transamerica. On or about January 2, 1934, the Bank of America

sold to Transamerica Bank Holding Company (which company, on April 20, 1935, changed its name to Inter-America Corporation) additional charged off assets of said Bank of America for an additional \$50,000. On or about October 1, 1936, Inter-Amer- [10] ica Corporation transferred the aforesaid charged off assets to California Lands Inc. and Capital Co. (both of said corporations being wholly owned by Transamerica General Corporation) for \$500,000. On or about July 14, 1937, California Lands, Inc. and Capital Co. sold the aforesaid charged off assets, less \$1,486,185 collected by Inter-America Corporation for their account, to the Bank of America for \$6,500,000., and Transamerica entered into an agreement with Bank of America guaranteeing it against losses in connection with said repurchase. In connection with this guarantee of the repurchase by Bank of America of its charged off assets, Transamerica pledged securities having a market value of \$1,338,835, and investments and securities of affiliates having a carrying value of \$5,636,576 as collateral security. That as a result of the foregoing transactions, Bank of America was enabled to and did write up its assets by an additional \$6,500,000 during the year 1937.

22. The balance sheets of California Lands Inc. and Capital Co. for the year 1936 set forth a profit from the above transactions of \$297,918.26 and \$297,919.23 respectively and in 1937, \$345,120.54 and \$345,119.56 respectively, which figures represent excess of realization over the cost of said charged off assets to the companies. Furthermore, in the year

1937, each of said companies set forth the sum of \$3,250,000 as profit realized in connection with the repurchase of the aforesaid charged off assets of Bank of America. The aforesaid entries on the books of California Lands, Inc. and Capital Co. were false and misleading.

23. That the purpose of the transactions referred to in Paragraphs "20", "21" and "22" of the complaint herein was to inflate and write up artificially the assets [11] of Bank of America. That in or about July, 1937, Bank of America ceased to be a wholly owned or virtually wholly owned subsidiary of Transamerica as aforesaid, and thereafter Transamerica owned approximately 30% of the stock of Bank of America. That the contracts and transactions referred to in paragraphs 20, 21 and 22 hereof were illegal, improper and ultra vires, and have resulted in great damage and irreparable loss and injury to Transamerica and its subsidiaries in an amount unknown to plaintiff, and unless said contracts and transactions are rescinded and cancelled will result in further irreparable loss, injury and damage to Transamerica and its subsidiaries. That by reason of the foregoing said contracts, guarantees, and pledges of securities by Transamerica and its subsidiaries referred to in paragraphs 20, 21 and 22 hereof should be cancelled and rescinded and the securities pledged in connection therewith released from pledge and restored to Transamerica and its subsidiaries.

24. In or about July, 1937, Transamerica sold to Bank of America 56,600 shares of National City

Bank stock at the prevailing market price of \$48 a share for a total purchase price of \$2,716,800. Payment for said stock was made by crediting \$2,716,800 to Inter-America Corporation in connection with the obligation of Inter-America Corporation to purchase the charged off assets of Bank of America pursuant to the aforesaid three contracts of June 26, 1931, December 30, 1931 and February 13, 1932, assigned to Inter-America Corporation in August 1933 as aforesaid, reducing by the amount of \$2,716,800 the balance of the \$35,214,000, which Inter-America Corporation was obliged to pay under said contracts. As part of the contract of purchase of said National City Bank stock, Transamerica agreed to repurchase the same at \$48 per share over a period of [12] five years at the rate of 11,320 shares per year and pledged an additional block of 18,400 shares to secure its obligations under said agreement. By the end of 1937, the market value of the aforesaid National City Bank stock had dropped to \$27. a share.

25. Although this transaction was treated by Transamerica according to its balance sheet for the year 1937 as an option to purchase certain securities, actually it was a binding agreement to purchase the said National City Bank stock and was illegal, improper and ultra vires and Transamerica has lost a large amount of money in connection with the said agreement and suffered other irreparable damage and loss, and unless said agreement is set aside is threatened with the loss of further moneys and further irreparable damage, loss and injury in connection therewith. Any such losses and damages in

connection with the said agreement have been and will continue to be a waste and misappropriation of the assets of Transamerica because neither Transamerica, nor its subsidiary, Inter-America Corporation, received any consideration or benefit in connection with the aforesaid transactions, whereby Bank of America was enabled to write up its doubtful assets by upwards of \$35,000,000. That said agreement to repurchase said National City Bank stock should be cancelled and rescinded. [13]

26. At all the times herein mentioned the defendants Elkus, Hoelscher, Hoffman, Smith and Walston were partners in the firm of Walston & Company. During the years 1932 to date, said defendants and said firm of Walston & Company made large profits as the result of commissions received from Transamerica, Bank of America and Pacific Coast Mortgage Co. in connection with underwriting and other services performed by Walston & Co. for Transamerica, Bank of America and Pacific Coast Mortgage Co. That during all of said times, A. P. Giannini, A. H. Giannini, L. M. Giannini and John M. Grant were financially interested in Walston & Co. although they did not disclose said financial interest to the other directors of Transamerica. The commissions and fees paid by Transamerica, Bank of America and Pacific Coast Mortgage Co. to Walston & Co. were excessive and were due to the control and domination of the Boards of Directors of said companies by the aforesaid individuals. As a result of their financial interest in Walston & Co. the afore-

said individuals realized large profits in an amount unknown to the plaintiff at the present time, at the expense of Transamerica, Bank of America and Pacific Coast Mortgage Co., for which they should be made to account to Transamerica.

27. From 1937 to date the defendants who were officers and directors of Transamerica, directly or indirectly, received remuneration from Transamerica, Pacific Coast Mortgage Company and other subsidiaries and affiliates of Transamerica in excess of that to which they were legally entitled and in violation of the by-laws of said companies to the damage of Transamerica, its subsidiaries and affiliates, for which they should account to Transamerica. [14]

28. That during the years 1937 and subsequent years Transamerica has filed with the Securities & Exchange Commission and the New York Stock Exchange and Los Angeles Stock Exchange, applications for the registration of shares of its capital stock, amendments to said application, information supplemental thereto, annual reports and other data and information required by the Securities & Exchange Act of 1934 and other Statutes and the rules and regulations applicable thereto. That said applications, amendments and reports and other information and data contained false and misleading information, failed to disclose information required to be disclosed and in other respects were false and inaccurate. As a result thereof, the Securities & Exchange Commission issued certain orders for hearings to determine whether said application for registration and amendments thereto and said annual reports and other in-

formation filed as aforesaid, failed to comply with the Securities & Exchange Act of 1934 and the rules and regulations applicable thereto and whether it was necessary or appropriate to suspend or withdraw such registration. As a result thereof, various hearings in respect to Transamerica have been held in Washington and Los Angeles and large sums of money have been expended by Transamerica for fees for accountants, investigators, witnesses, attorneys and for the printing of records, transportation and other expenses incidental to said hearings and the investigations conducted by the Securities & Exchange Commission. That all of said expenditures could have been avoided by a reasonably prompt compliance with the Securities & Exchange Act of 1934 and the rules and regulations applicable thereto, but that the individual defendants failed and refused to comply therewith and failed and refused to comply with the reasonable requests of the Securities & Exchange Commission. As [15] a consequence thereof, the aforesaid expenditures have resulted in great damage to Transamerica and the aforesaid expenditures have been a waste of the assets of Transamerica.

29. That from 1931 to date A. P. Giannini, A. H. Giannini, L. M. Giannini and John M. Grant have participated in pools for the purpose of manipulating the market value of Transamerica's stock, and in order to enable them to buy and sell the said stock at substantial profits. As a result said defendants were enabled to make substantial profits for which they should be made to account to Transamerica.

30. That the acts and transactions heretofore referred to in paragraphs 12-29 of this complaint, were part of a plot, plan and conspiracy by A. P. Giannini, A. H. Giannini, L. N. Giannini and John M. Grant to use the domination and control which said defendants exercised over the affairs of Transamerica and its subsidiaries for their own advantage and to the detriment and at the expense of Transamerica and its subsidiaries. All of the defendants who have been directors of Transamerica from 1931 to date became parties to said unlawful plot, plan and conspiracy at or about the time of their respective assumptions of office, in that they knew of, acquiesced in and consented to all of the wrongful acts committed pursuant to said unlawful plot, plan and conspiracy as hereinbefore alleged prior to their respective assumptions of office, and further in that they, having full knowledge of such acts, failed to and refused to seek legal redress therefor on behalf of Transamerica, although such redress could have been had, and in that they agreed to and participated in all wrongful acts committed pursuant to said unlawful plot, plan and conspiracy after their respective assumptions of office. [16]

31. That as a result of the foregoing, defendants A. P. Giannini, A. H. Giannini, L. M. Giannini and John M. Grant have realized large profits at the expense of Transamerica and Transamerica has sustained substantial damages. The exact amount of such profits realized and damages suffered is unknown to plaintiff and can be ascertained only by an accounting in this action.

32. The directors of Transamerica have from 1931 to date, fraudulently concealed the acts, transactions and matters hereinbefore referred to from the plaintiff and the other stockholders of Transamerica. Said acts, transactions and matters were not referred to in the annual reports and other communications from Transamerica to its stockholders; and the minute book, books of account and other books and records of Transamerica failed to disclose or misrepresented said acts, transactions and matters, in whole or in part. The plaintiff has only recently learned of the acts, transactions and matters hereinbefore referred to, as a result of the investigation conducted by the Securities & Exchange Commission into the affairs of Transamerica.

33. That plaintiff has made no demand upon Transamerica, or upon the Board of Directors of Transamerica to institute and prosecute actions to recover for the wrongs complained of herein because all of the present directors of Transamerica participated in said wrongful acts and are liable to account therefor, or with full knowledge thereof acquiesced and consented thereto, and failed and refused to seek legal redress therefor, and without their consent and direction such suits would not be brought, and such demand would be futile and unavailing. Moreover the acts complained of herein have at all times been known to present [17] directors of Transamerica, but these directors, acting in bad faith have failed, refused and neglected to take any steps whatsoever to seek redress for such wrongs for the benefit of Transamerica.

34. That plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays for judgment (a) that A. P. Giannini, A. H. Giannini, L. M. Giannini and John M. Grant be required to account to Transamerica for all profits, gains, benefits and emoluments obtained and secured by them by reason of the matters hereinbefore set forth; (b) that the defendants, and each of them be required to account to Transamerica for all losses and damages sustained by Transamerica by reason of the matters hereinbefore set forth; (c) that the defendants and each of them, other than Transamerica, be required to pay to the plaintiff the reasonable expenses incident to the prosecution of this action, including a reasonable counsel fee; and (d) that plaintiff have such other and further relief as to the Court may seem just and proper.

JOSEPH A. RUSKAY,
VINCENT A. MARCO,
PERCY V. CLIBBORN

By PERCY V. CLIBBORN,
Attorney for Plaintiff. [18]

State of New York

County of Bronx—ss.

Rose Papantonio, being duly sworn, deposes and says she is the plaintiff in the within action; that she has read the foregoing complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated

to be alleged on information and belief, and that as to those matters she believes it to be true.

ROSE PAPANTONIO

Sworn to before me this 27th day of March, 1941.

THOMAS VIRCIGLIO,

Thomas Virciglio, Notary Public, Bronx Co. Clk's.
No. 9, Reg. [Illegible]

Form No. 1

State of New York,

County of Bronx—ss.

No. 30034

I, Michael B. McHugh, Clerk of the County of Bronx (and Clerk of the Supreme Court of said County, and Clerk of the County Court for said County, the same being Courts of Record, having by law a seal), Do Hereby Certify, That Thomas Virciglio, whose name is subscribed to the certificate of acknowledgment, proof, affidavit or deposition of the annexed instrument and thereon written, was on the day of the date thereof a Notary Public within and for, and residing in said County, duly commissioned, qualified and sworn, having full power and authority by the laws of said State to take the acknowledgments of deeds or conveyances for lands, tenements and hereditaments in said State, and certify to same; also to administer oaths, to take depositions out of court, and to give certificates thereof; that full faith and credit may, and ought to be given to his official acts and attestations; that I have compared the signature on file in this office and verily believe that the signature of said certificate of acknowledgment, proof, affidavit or deposition, is his

genuine official signature as appears by the records of this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, this 20 day of March, 1941.

MICHAEL B. McHUGH,
Clerk.

[Endorsed]: Filed April 16, 1941. [19]

In the District Court of the United States, Southern
District of California, Central Division

No. 1490 B. H.

ROSE PAPANTONIO, suing in her own behalf as
a shareholder of TRANSAMERICA CORPO-
RATION and in behalf of all other sharehold-
ers of said corporation similarly situated,
Plaintiff,

vs.

AMADEO P. GIANNINI; L. M. GIANNINI;
A. H. GIANNINI; AMADEO P. GIANNINI,
As Executor of the Last Will and Testament of
VIRGIL D. GIANNINI, Deceased; BANK
OF AMERICA NATIONAL TRUST & SAV-
INGS ASSOCIATION, a national banking
association, as Administrator-With-The-Will-
Annexed of the Estate of JOHN M. GRANT,
Deceased; GORDON GRAY; O. D. HAMLIN;
T. W. HARRIS; A. P. JACOBS; F. G.

STEVENOT; RUSS AVERY; P. A. BRICCA, GEORGE J. DE MARTINI; W. N. LAGOMARSINO; A. J. SCAMPINI, WILLIAM E. BLAUER; LEON BOCQUERAZ; E. H. CLARK; CHARLES N. HAWKINS; W. F. MORRISON; A. J. MOUNT; ALFRED E. SPARBORO; CHESTER H. LOVELAND; P. C. HALE; JAMES A. BACIGALUPI; ARMANDO PEDRINI; GEORGE A. WEBSTER; E. J. NOLAN; C. R. BELL W. W. GARTHWAITE; GEORGE N. ARMSBY; LOUIS FERRARI; V. SCIALOJA; THEODORE M. STUART; HERBERT E. WHITE; CHARLES DE Y. ELKUS, WILLIAM S. HOELSCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C. WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI, and CLAIRE GIANNINI HOFFMAN, transacting business as co-partners under the firm name and style of WALSTON & CO., and AMADEO P. GIANNINI, as the Executor of the Last Will and Testament of VIRGIL D. GIANNINI, a deceased member of said co-partnership; WALSTON & CO., a co-partnership; TRANSAMERICA CORPORATION, a corporation; [21] JOHN ONE; JOHN TWO; JOHN THREE; JOHN FOUR; JOHN FIVE; JOHN SIX; JOHN SEVEN; JOHN EIGHT; JOHN NINE; JOHN TEN; JANE ONE; JANE TWO; JANE THREE; JANE FOUR; JANE FIVE; JANE SIX; JANE SEVEN; JANE EIGHT; JANE NINE;

JANE TEN; ONE COMPANY, a corporation; TWO COMPANY, a corporation; THREE COMPANY, a corporation; FOUR COMPANY, a corporation; FIVE COMPANY, a corporation; SIX COMPANY, a corporation; SEVEN COMPANY, a corporation; EIGHT COMPANY, a corporation; NINE COMPANY, a corporation; TEN COMPANY, a corporation; JOHN DOE, RICHARD ROE, JANE DOE and JANE ROE, transacting business as co-partners under the firm name and style of DOE & ROE COMPANY; and DOE & ROE COMPANY, a co-partnership,
Defendants.

FIRST AMENDED COMPLAINT

Comes Now the above named plaintiff complaining of the above named defendants, and for her cause of action alleges upon information and belief, except as to paragraphs III, V, XIX, and XLIV, which plaintiff alleges upon knowledge, as follows:

I.

Defendant Transamerica Corporation has been since on or about the 11th day of October, 1928, and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and at all times mentioned herein transacting business within the State of California, having its principal office and place of business in said state in the City and County of San Francisco.

II.

Defendant Transamerica Corporation at all times mentioned herein was and now is engaged in a general business of acquiring, holding, owning, controlling, and operating other corporations and associations engaged in the banking, investment, brokerage, real estate and other businesses, among others including the following: [22] Bank of America National Trust & Savings Association, a national banking association; Transamerica General Corporation, a corporation; Pacific Coast Mortgage Company, a corporation; Western States Corporation, a corporation; Associated American Distributors, a corporation; Bank of America Company, a corporation; Transamerica Service Corporation, a corporation; Service Corporation, a corporation; Intercoast Trading Company, a corporation; California Lands, Inc., a corporation; Capitol Co., a corporation; Bankitaly Company of America, a corporation; Inter-American Corporation, a corporation; American Brokerage, Inc., a corporation; Corporation of America, a corporation; Occidental Life Insurance Co., a corporation; Pacific National Fire Insurance Co., a corporation; Commercial Holding Fire Insurance Co., a corporation; Transamerica Bank Holding Co., a corporation; Inter-Continental Corporation, a corporation.

III.

Plaintiff is and at all times herein mentioned since on or about the 7th day of March, 1929, has been a shareholder of defendant Transamerica Corpora-

tion, and as such institutes this action on behalf of herself, said corporation, and all other shareholders thereof similarly situated.

IV.

Bank of America National Trust & Savings Association, a national banking association, sued as a defendant herein as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, deceased, is, and at all times mentioned herein was, a national banking association duly organized, acting and existing, under and by virtue of the laws of the United States, with its principal offices and places of business in the City and County of San Francisco, and the City of Los Angeles, County of Los Angeles, [23] in the State of California, and then and there duly authorized to and engaged and engaging in a general banking and trust company business.

V.

Plaintiff now is, and at all times mentioned herein was, a citizen and resident of the State of New York.

VI. and VII.

Defendant Transamerica Corporation, a corporation, is and at all times mentioned herein was, a citizen and resident of the State of Delaware.

VIII.

Defendant co-partnership Walston & Co., is, and at all times mentioned herein was, a co-partnership composed of two or more persons associated and transacting business under said common name, the

members thereof being the individual defendants herein named, to wit: Charles De Y. Elkus, Vernon C. Walston, William S. Hoelscher, C. J. Smith, Clifford P. Hoffman, Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman, and Virgil D. Giannini, now deceased.

IX.

Defendant Walston & Co., a co-partnership is, and at all times mentioned herein was, engaged in a security brokerage business in the State of California, with its principal office and place of business in the City and County of San Francisco, and at all such times was and now is a citizen and resident of the State of California.

X.

This plaintiff is ignorant of the true names of the defendants designated and sued herein by and under fictitious names, and for that reason they are sued herein under fictitious names; [24] and plaintiff prays that when their true names are ascertained that they may be inserted herein, and that they may thereupon and thereafter be proceeded against in all subsequent proceedings in this action under their true names.

The aforesaid persons and associations sued herein as defendants under fictitious names, and each of them, participated with the other defendants in all and singular the acts and wrongs herein alleged and complained of.

XI.

Each and all of the individual defendants named herein are citizens and residents of the State of California. Defendants, A. H. Giannini, Russ Avery and C. R. Bell all reside in Los Angeles County, and W. N. Lagomarsino resides in the County of Ventura, in said state; defendant Theodore M. Stuart resides in the County of Fresno, and defendant Gordon Gray resides in the County of San Diego, in said state.

XII.

On or about the 28th day of April, 1938, the aforesaid Virgil D. Giannini mentioned in paragraph VIII herein, died testate in the City and County of San Francisco, State of California, and thereafter the aforesaid defendant, Amadeo P. Giannini, was appointed the Executor of his Last Will and Testament and estate, and thereupon duly qualified as such Executor and has ever since been and still is acting as such.

XIII.

On or about the 25th day of March, 1941, the aforesaid John M. Grant, mentioned and named in paragraph XX hereof, died testate in the City and County of San Francisco, State of California, and thereafter the defendant, Bank of America National Trust & Savings Association, a national banking association, was duly appointed the Administrator-With-The-Will-Annexed of his estate, and thereupon duly qualified as such Administrator, and ever [25] since has been and still is acting as such.

XIV.

Defendant Amadeo P. Giannini, as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased, is, and at all times mentioned herein was, a citizen and resident of the State of California.

XV.

Defendant Bank of America National Trust & Savings Association, a national banking association, as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, Deceased, is, and at all times mentioned herein was, a citizen and resident of the State of California.

XVI.

The jurisdiction of this Court depends upon a diversity of citizenship between the plaintiff and the defendants.

XVII.

This action is not a collusive one instituted for the purpose of conferring on a Court of the United States jurisdiction of an action of which it would not otherwise have cognizance.

XVIII.

The matter in controversy, exclusive of interests and costs, exceeds the sum or value of Three Thousand and no/100 Dollars (\$3,000.00).

XIX.

Plaintiff was a shareholder of the defendant, Transamerica Corporation, at the time of each and all of the transactions of which she complains herein.

XX.

The following named individual defendants herein were each duly elected a member of the Board of Directors and officers of the defendant Transamerica Corporation, and accepted and assumed the corporate powers, duties and liabilities of such [26] offices, during the approximate times and periods as follows, a more definite or certain statement thereof plaintiff being unable to set forth:

| Name of Directors | Held Office | | | Held Office | | |
|----------------------|-------------------------------|------|----------|-------------|------|----------|
| | From | On | Or About | To | On | Or About |
| (1,4) | | | | | | |
| Amadeo P. Giannini | Oct. | 11, | 1928 | Feb. | 14, | 1931 |
| (4) | | | | | | |
| Amadeo P. Giannini | Mar. | 31, | 1932 | | | 1940 |
| (1) | | | | | | |
| L. M. Giannini | Feb. | 8, | 1929 | Feb. | 14, | 1931 |
| L. M. Gianinni | March | 29, | 1933 | | | 1940 |
| (6) | | | | | | |
| A. H. Giannini | February, | 1929 | | Feb. 14, | 1930 | |
| | (Also Vice President in 1928) | | | | | |
| (1) | | | | | | |
| John M. Grant | March | 30, | 1932 | | | 1940 |
| Gordon Gray | March | 30, | 1932 | | | 1940 |
| O. D. Hamlin | March | 30, | 1932 | | | 1940 |
| T. M. Harris | March | 30, | 1932 | | | 1940 |
| F. G. Stevenot | March | 30, | 1932 | | | 1939 |
| Russ Avery | March | 30, | 1932 | | | 1938 |
| P. A. Bricca | March | 30, | 1932 | | | 1940 |
| George J. De Martini | March | 30, | 1932 | | | 1940 |
| W. M. Lagomarsino | March | 30, | 1932 | | | 1940 |
| A. J. Scampini | March | 30, | 1932 | | | 1938 |
| Wm. E. Blauer | Feb. | 8, | 1929 | Feb. | 14, | 1931 |
| Leon Bocqueraz | Feb. | 8, | 1929 | Feb. | 14, | 1931 |
| E. H. Clark | Feb. | 8, | 1929 | Feb. | 14, | 1931 |
| Charles N. Hawkins | Feb. | 8, | 1929 | Feb. | 14, | 1931 |
| W. F. Morrish | Feb. | 8, | 1929 | Feb. | 14, | 1931 |

| Name of Directors | Held Office | Held Office |
|-----------------------|------------------|----------------|
| | From On Or About | To On Or About |
| (6) | | |
| A. J. Mount | Feb. 8, 1929 | Feb. 14, 1931 |
| Alfred E. Sparboro | Feb. 8, 1929 | Feb. 14, 1931 |
| Chester E. Loveland | Feb. 8, 1932 | Mar. 30, 1933 |
| (6) | | |
| P. C. Hale | Oct. 11, 1928 | Feb. 14, 1931 |
| | | [27] |
| (1, 6, 4½) | | |
| James A. Bacigalupi | Oct. 11, 1928 | Mar. 31, 1931 |
| (6) | | |
| Armando Pedrini | Feb. 8, 1929 | Mar. 30, 1933 |
| (6) George A. Webster | Feb. 8, 1930 | Feb. 14, 1931 |
| E. J. Nolan | Feb. 28, 1929 | Feb. 14, 1931 |
| (6) | | |
| C. R. Bell | Feb. 8, 1929 | Feb. 14, 1931 |
| W. W. Garthwaite | Feb. 8, 1929 | Feb. 14, 1931 |
| George Armsby | Feb. 14, 1930 | Mar. 31, 1932 |
| Louis Ferrari | Feb. 8, 1930 | Feb. 14, 1931 |
| V. C. Scialoja | Feb. 8, 1931 | Mar. 29, 1934 |
| Theodore M. Stuart | Mar. 31, 1932 | 1939 |
| Herbert W. White | Mar. 31, 1932 | 1939 |

(1) Preceding the names of any of the foregoing directors indicates that that individual was also President of Transamerica Corporation during a portion of the period indicated.

(2) Preceding the names of any of the foregoing directors indicates that that individual was also Chairman of the Board of Directors of Transamerica Corporation during a portion of the period indicated.

(3) Preceding the names of any of the foregoing directors indicates that that individual was also Chairman of the Executive Committee of the Board of Directors of Transamerica Corporation during a portion of the period indicated.

(4) Preceding the names of any of the foregoing directors indicates that that individual was also Chairman of the Advisory Committee of the Board of Directors of Transamerica Corporation during a portion of the period indicated.

(4½) Preceding the names of any of the foregoing directors indicates that that individual was also Vice Chairman [28] of the Advisory Committee of the Board of Directors of Transamerica Corporation during a portion of the period indicated.

(5) Preceding the names of any of the foregoing directors indicates that that individual was also Executive Vice President of Transamerica Corporation during a portion of the period indicated.

(6) Preceding the names of any of the foregoing directors indicates that that individual was also Vice President of Transamerica Corporation during a portion of the period indicated.

(7) Preceding the names of any of the foregoing directors indicates that that individual was also Secretary of Transamerica Corporation during a portion of the period indicated.

(8) Preceding the names of any of the foregoing directors indicates that that individual was also Treasurer of Transamerica Corporation during a portion of the period indicated.

XXI.

At and during all of the times mentioned herein defendants Amadeo P. Giannini, L. M. Giannini and John M. Grant, now deceased, by and through stock ownership, proxies, and various other means and

devices with respect to which plaintiff is unable to make a more definite statement, selected and named the officers and members of the Board of Directors of defendant Transamerica Corporation, and controlled, dominated and determined its entire business policies and affairs.

With respect to said directors and officers selected and named, as aforesaid, plaintiff alleges that in each and all of the corporate transactions herein mentioned such defendant directors and officers and each of them did not at any time exercise any independent judgment in considering or determining corporate action with respect to such transactions or any or either of them, but on the other hand did at all times in the performance [29] of their official functions respecting such transactions, and each and all thereof, knowingly permit their official acts and conduct to be dictated, controlled and dominated by said defendants, Amadeo P. Giannini, L. M. Giannini and John M. Grant, Deceased, for the purpose of enhancing the personal and individual interests of each of said defendants and said persons to the detriment of defendant Transamerica Corporation, and its shareholders, as hereinafter more particularly set forth.

XXII.

On or about the 10th day of June, 1919, defendants Amadeo P. Giannini, P. C. Hale and James A. Bacigalupi organized and caused to be incorporated under and by virtue of the laws of the State of New York a corporation named and hereinafter

referred to as Bancitaly Corporation. Said corporation was organized for the purpose of engaging in a general business of acquiring, holding, owning, controlling and operating various other corporations and associations. The three defendants hereinbefore in this paragraph referred to, together with other persons, acted as members of the Board of Directors of said corporation upon its organization as aforesaid. On or about the 24th day of April, 1923, said corporation was duly authorized to transact business in the State of California, and did thereafter engage in a general business of acquiring, holding, owning, controlling and operating various other corporations and associations, the names of such corporations and associations and the precise nature of their respective businesses being to plaintiff unknown.

XXIII.

Said Bancitaly Corporation, after its organization, as aforesaid, continued to actively function and engage in the business for which it was created until on or about the time that defendant Transamerica Corporation was organized as [30] hereinbefore set forth in paragraph I hereof, and during all of said period defendant Amadeo P. Giannini was the President of said Bancitaly Corporation, and a member of its Board of Directors, actively engaged in the exercise of the duties and functions pertaining to said offices, and the remaining members of the Board of Directors and other officials of said corporation were, and each of them was, at all such times a dummy agent and alter ego of said

defendant Amadeo P. Giannini, and as such controlled and dominated by him for the purpose of enhancing his own personal and individual interests to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned.

XXIV.

That on or about the 13th day of April, 1927, said Bancitaly Corporation, acting by and through its said Board of Directors referred to in the preceding paragraph hereof, made and entered into a written agreement with defendant Amadeo P. Giannini to the effect that for his personal services rendered and to be rendered as President of said corporation he should receive and be paid five per cent (5%) of the net profits of said corporation per annum, with a guaranteed minimum of One Hundred Thousand Dollars (\$100,000.00) per annum, commencing January 1, 1927, in lieu of salary.

Plaintiff alleges that the execution and making of said salary agreement was beyond the scope of the corporate powers of said Bancitaly Corporation, and in excess of the authority of its officials and Board of Directors, and was caused to be made by said Amadeo P. Giannini, and knowingly permitted by the remaining members of the Board of Directors and other officials of said Bancitaly Corporation, each and all of whom intended thereby to enhance the personal and individual interests of and unjustly enrich the said defendant, Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars [31] hereinafter mentioned.

XXV.

Pursuant to said salary agreement mentioned in paragraph XXIV hereof, and for a certain period ending on or about January 1, 1929, with respect to which plaintiff is unable to make a more definite statement, defendant Amadeo P. Giannini caused, and the remaining members of the Board of Directors and other officials of said Bancitaly Corporation knowingly permitted, certain entries and records to be made and entered upon the corporate records and books of account of said corporation as purported credits in favor of said defendant, Amadeo P. Giannini, in substantial sums, aggregating approximately Nine Hundred Twenty-five Thousand Dollars (\$925,000.00), and, as such, to appear upon the corporate records and books of account as purported liabilities of said corporation, with respect to all of which plaintiff is unable to make a more definite or certain statement concerning the dates and amounts of the several items involved in such entries and records.

Plaintiff further alleges with respect to the said entries and records, aforesaid, that the total credit and each item thereof so entered and recorded upon the corporate records and books of account of said Bancitaly Corporation in favor of said defendant, Amadeo P. Giannini, was and is false and untrue, in that the same does not truly and correctly represent five per cent (5%) of the actual and true net profits of said corporation for said period or any part thereof, but on the other hand was and is in excess thereof, and by said defendant and said direc-

tors and officers knowingly computed upon false, fictitious, inflated and untrue book profits, the precise extent thereof being to plaintiff unknown, and all of which was so caused to be done by said defendant, Amadeo P. Giannini, and knowingly permitted by the remaining members of the Board of Directors and [32] other officials of said Bancitaly Corporation, with the intent of each of them to thereby enhance the personal and individual interests of and unjustly enrich the said defendant, Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned.

XXVI.

On or about the 27th day of December, 1928, defendant Amadeo P. Giannini caused, and his co-defendant directors and officers of defendant Transamerica Corporation knowingly permitted, said defendant Transamerica Corporation by mesne contracts and other instruments in writing, the precise nature of which being to plaintiff unknown, to acquire all of the assets of Bancitaly Corporation hereinbefore mentioned, and to assume as its own obligations all of its liabilities, including the written salary agreement set forth in paragraph XXIV hereof, and the purported liabilities evidenced upon the corporate records and books of account of said corporation by the credit entries as set forth in paragraph XXV hereof, all of which was so caused and permitted by said defendants with the intent of each of them to enhance the personal and individual interests of and unjustly enrich said defendant,

Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned.

XXVII.

During a period commencing on or about the 1st day of January, 1927, and ending on or about the 1st day of January, 1930, a more certain or more definite statement thereof plaintiff being unable to set forth, pursuant to the purported corporate liability evidenced by said salary agreement set forth in paragraph XXIV hereof and assumed by defendant Transamerica Corporation in the manner and for the purposes heretofore mentioned in paragraph XXV hereof, said defendant, Amadeo P. [33] Giannini, from time to time caused, and his co-defendant directors and officers of said defendant, Transamerica Corporation, knowingly permitted, certain entries and records to be made and entered upon the corporate records and books of account of said corporation as purported credits in favor of said defendant, Amadeo P. Giannini, in substantial sums, aggregating approximately not less than Five Million Dollars (\$5,000,000.00), and, as such to appear upon the corporate records and books of account of said corporation as purported liabilities of said corporation, with respect to all of which plaintiff is unable to make a more definite or certain statement concerning the dates and amounts of the several items involved in such entries and records.

Plaintiff further alleges with respect to the said entries and records aforesaid that the total credit and each item thereof so entered and recorded upon

the corporate records and books of account of said defendant, Transamerica Corporation, in favor of said defendant, Amadeo P. Giannini, was and is false and untrue in that the same does not truly and correctly represent five per cent (5%) of the actual and true net profits of said corporation for said period or any part thereof, but on the other hand was and is in excess thereof, and by said defendants, and each of them, knowingly computed upon false, fictitious, inflated and untrue book profits, the precise extent thereof being to plaintiff unknown, and all of which was so caused to be done by said defendant, Amadeo P. Giannini, and knowingly permitted by his co-defendant directors and officers of said defendant Transamerica Corporation, with the intent of each of them to thereby enhance the personal and individual interests of, and unjustly enrich the said defendant, Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned. [34]

XXVIII.

With respect to the credits and each item thereof in favor of defendant Amadeo P. Giannini, appearing as a corporate liability upon the books of account of the Bancitaly Corporation, as set forth in paragraph XXV hereof, and the credits and each item thereof in favor of said defendant appearing as a corporate liability upon the books of account of defendant Transamerica Corporation, as set forth in paragraph XXVII hereof, plaintiff alleges that the same, and each of the items thereof, evi-

dence sums of money purportedly payable to said defendant, Amadeo P. Giannini, which were by him unearned, and for which he gave no consideration, and which constituted unauthorized and illegal corporate liabilities of the said defendant, Transamerica Corporation.

XXIX.

During a period commencing on or about the 1st day of January, 1927, and ending on or about the 1st day of January, 1939, the defendant Amadeo P. Giannini caused, and his co-defendant directors and officers of said Transamerica Corporation herein named knowingly permitted, the said corporation to pay to said defendant, Amadeo P. Giannini, from time to time substantial sums of money aggregating not less than approximately Five Million Dollars (\$5,000,000.00) on account of and by reason of said wrongful credits heretofore set forth in paragraphs XXV and XXVII, the precise amounts and the days and dates of such payments being to plaintiff unknown, except with respect to a sum not less than approximately Seven Hundred Seventy-eight Thousand, Four Hundred Seventy Dollars, Two Cents (\$778,470.02), which plaintiff alleges was paid by defendant Transamerica Corporation in the manner aforesaid to the said defendant, Amadeo P. Giannini, in the approximate sums and amounts as follows: [35]

\$134,826.58 in and during the year 1932;

\$132,896.92 in and during the year 1933;

\$100,596.24 in and during the year 1934;

\$351,952.03 in and during the year 1935;

\$ 65,914.28 in and during the year 1936;
\$ 58,284.37 in and during the year 1937; and
\$ 34,000.00 in and during the year 1938;

by reason of all of which defendant Amadeo P. Giannini was from the funds and assets of defendant Transamerica Corporation unjustly enriched to the detriment of said corporation and its shareholders to the extent of at least approximately Five Million Dollars (\$5,000,000.00), the precise sum and amount thereof being to plaintiff unknown, and concerning all of which plaintiff alleges that each and all of the payments of said sums of money as herein set forth were knowingly caused and permitted to be made by said defendants with the intent of each of them to enhance the personal and individual interests of and unjustly enrich the said defendant, Amadeo P. Giannini, to the detriment of said corporation and its shareholders.

XXX.

Plaintiff alleges that during all of the times herein mentioned and involving all of the transactions herein mentioned the defendants, Amadeo P. Giannini, L. M. Giannini and John M. Grant, Deceased, caused, and their co-defendant directors knowingly permitted, such transactions and the general business and affairs of defendant, Transamerica Corporation, and its assets and liabilities to appear to be reflected by records and books of account kept, maintained and operated, by an involved, intricate and complex system of accounting in conflict with the usual, customary, proper and recognized principles of the science of accounting, and entirely beyond the knowledge and understanding of the

plaintiff with respect to such subject, and that the [36] corporate transactions heretofore set forth involved in such corporate records and books of account, with respect to the assets and liabilities of the corporation, as set forth in paragraphs XXV, XXVI and XXVII hereof, and with respect to the payments and disbursements involved and set forth in paragraph XXIX hereof, were covered, disguised and concealed beyond discovery by entries and records made under and by false, misleading and untrue names and designations, not required by and in conflict with the usual, customary, proper and recognized principles of accounting procedure.

XXXI.

On or about the 17th day of December, 1932, at a time when defendant Transamerica Corporation was actively engaged in a substantial and profitable security brokerage business, defendants Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman, and Virgil D. Giannini (now deceased), for the purpose and with the intent of each of them of enhancing their own respective personal and individual interests to the detriment of defendant Transamerica Corporation, caused to be organized and created a certain co-partnership under the name and style of Walston & Co. as set forth in paragraphs VIII and IX hereof, the other individual members thereof, namely, defendants Charles De Y. Elkus, Vernon C. Walston, William S. Hoelcher, C. J. Smith and Clifford P. Hoffman, and each of them, being also then and there, and at all times

thereafter, the duly appointed secret trustee, agent and representative, of defendants Amadeo P. Giannini, L. M. Giannini, Claire G. Hoffman, and Virgil D. Giannini (now deceased), with respect to the conduct and all operations of the business and affairs of the defendant co-partnership and concerning their several interests therein.

Plaintiff alleges that at all times mentioned herein from and after the organization thereof the entire business and [37] affairs of said defendant co-partnership was owned, controlled and directed by said defendants, Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman, and said Virgil D. Giannini (now deceased), and as such constituted and was the alter ego of each of said defendants.

XXXII.

At all times after the organization of said defendant co-partnership, Walston & Co., in the manner and for the purposes set forth in paragraph XXXI hereof, defendants Amadeo P. Giannini and L. M. Giannini caused, and their co-defendant directors and officers of defendant Transamerica Corporation knowingly permitted said defendant Transamerica Corporation to divert and transfer all of its said security brokerage business, and of which said defendants then and there exercised management and control, to said defendant co-partnership, Walston & Co., all of which was from time to time during said years accomplished by said defendants and their co-defendant officers and directors, with the intent of each of them to enhance

the personal and individual interests of defendants, Amadeo P. Giannini, L. M. Giannini, Virgil D. Giannini (now deceased) and Claire Giannini Hoffman, to the detriment of the defendant, Transamerica Corporation and its shareholders.

XXXIII.

In and during the years 1932, 1933, 1934, 1935, 1936, 1937, and 1938, defendants Amadeo P. Giannini and L. M. Giannini, and each of them, caused, and their co-defendant directors and officers of defendant Transamerica Corporation knowingly permitted, said defendant corporation to unnecessarily pay from its funds and assets to said defendant co-partnership, Walston & Co., large and substantial sums of money as brokerage fees for services with respect to corporate stock transactions derived from the business so diverted which belonged to defendant Transamerica Corporation, [38] and also substantial sums of money for use as capital for said defendant co-partnership and other purposes, with respect to all of which plaintiff states that the precise dates, details, and amounts of such payments were and are unknown to the plaintiff, but concerning which plaintiff further alleges that the same aggregated a total sum of not less than approximately Five Hundred Thousand Dollars (\$500,000.00), and all of which was received and accepted by said defendant co-partnership, Walston & Co., as the alter ego and dummy agent of and for the use and benefit of said defendants, Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman,

and Virgil D. Giannini (now deceased), and all of which was thereafter from time to time divided and disbursed by said defendant co-partnership, Walston & Co., to said last named defendants, and said Virgil D. Giannini (now deceased), and by reason of which said defendants and said Virgil D. Giannini (now deceased), and each of them, were from the funds and assets of defendant Transamerica Corporation unjustly enriched to the detriment of said corporation and its shareholders in the sum and amount and to the extent of at least approximately Five Hundred Thousand Dollars (\$500,000.00), the precise sum and amount thereof being to plaintiff unknown.

Concerning all of said payments from the funds and assets of defendant Transamerica Corporation to the defendant co-partnership, Walston & Co., in the manner and for the purposes as hereinbefore set forth, plaintiff alleges that each and all thereof were caused to be made by the said defendants, Amadeo P. Giannini, L. M. Giannini, and knowingly permitted by all their co-defendant directors and officers of defendant Transamerica Corporation, with the intent of each of them to enhance the personal and individual interests of and unjustly enrich said defendants, Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman, and Virgil D. Giannini (now deceased), to the detriment of said [39] corporation and its shareholders.

XXXIV.

All of the transactions mentioned and set forth in paragraphs XXXI, XXXII and XXXIII

hereof concerning the organization and creation of defendant co-partnership, Walston & Co., and particularly the partnership, financial and other interests therein owned, controlled and held by the defendants, Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman and Virgil D. Giannini (now deceased), and the division and distribution of the profits of said defendant co-partnership to said Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman, and Virgil D. Giannini (now deceased), were by defendants Amadeo P. Giannini and L. M. Giannini and their co-defendant directors and officers withheld from the corporate records of defendant Transamerica Corporation, and at all times evidenced and concealed by secret and private agreements and transactions of which plaintiff had no knowledge or information of any kind or character, the precise nature and character thereof plaintiff being unable to more definitely set forth.

XXXV.

During the year 1932, the precise date being to plaintiff unknown, and at all times thereafter, as mentioned herein, the Bankitaly Mortgage Company was and now is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and place of business in the City of San Francisco, and there operating and conducting a general mortgage, real estate, and investment business, including speculative operations in the capital stock of defendant Transamerica Corporation by purchasing and sell-

ing the same upon the various stock exchanges of the United States.

During the year 1932, the precise date of which plaintiff is unable to set forth, defendants Amadeo P. Giannini, L. M. [40] Giannini and Virgil D. Giannini (now deceased), by divers means and methods unknown to plaintiff, organized, created and maintained a certain private and secret trust syndicate, having for its purpose speculative operations in the capital stock of defendant Transamerica Corporation by selling and purchasing the same upon the various stock exchanges of the United States, wherein and whereby one Charles J. Smith and one Margaret Mallory were the trustees thereof, and said defendants Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), were the beneficiaries.

XXXVI.

During the year 1933, the precise date of which plaintiff is unable to set forth, defendants Amadeo P. Giannini, L. M. Giannini and John M. Grant, together with their co-defendant directors and officers of defendant Transamerica Corporation, caused Interstate Trading Company, a corporation heretofore mentioned in paragraph II hereof, to change its name to Associated American Distributors, Inc., and thereafter during the years 1934, 1935, 1936, aid and assist defendants Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), in their speculative stock operations by engaging in a general business of soliciting orders

from the general public for the purchase of the capital stock of defendant Transamerica Corporation, through defendant co-partnership, Walston & Co., upon the various stock exchanges of the United States.

XXXVII.

During the year 1932, the precise days and dates thereof being to plaintiff unknown, defendants Amadeo P. Giannini and L. M. Giannini, with the intent of each of them to enhance their respective personal and individual interests to the detriment of defendant Transamerica Corporation and its shareholders, and with the knowledge and consent of their co-defendant directors and [41] officers of said defendant, Transamerica Corporation, acquired and used the funds and assets of said defendant corporation in large sums and amounts, and the private and confidential knowledge and information acquired in their said capacity as officers and directors thereof, for speculative operations in the purchase and sale of the capital stock of defendant Transamerica Corporation upon the various stock exchanges in the United States in the particulars hereinafter set forth.

XXXVIII.

In and during the year 1932, the precise date of which being to the plaintiff unknown, defendants Amadeo P. Giannini and L. M. Giannini caused, and their co-defendant directors and officers knowingly permitted, defendant Transamerica Corporation to pay and advance from its funds and assets

substantial sums of money, the precise amounts thereof being to plaintiff unknown, but aggregating a total of not less than approximately One Million Five Hundred Thousand Dollars (\$1,500,000.00) to defendants, Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), which was by them used and disbursed for the purchase and acquirement of the controlling interest in the capital stock of the said Bankitaly Mortgage Company, heretofore mentioned in paragraph XXXV hereof, and for the purpose of furnishing capital for the further speculative stock operations and business of said Bankitaly Mortgage Company, the said defendants, Amadeo P. Giannini and L. M. Giannini, caused, and their co-defendant directors and officers knowingly permitted, defendant Transamerica Corporation to pay and advance from its funds and assets substantial sums of money, the precise amounts thereof being to plaintiff unknown, but aggregating a total of not less than approximately One Million Five Hundred Thousand Dollars (\$1,500,000.00) to, and into the treasury of said Bankitaly Mortgage Company.

Plaintiff alleges that each and all of the said [42] payments and advances of the funds and assets of defendant Transamerica Corporation above set forth were caused to be made by said defendants Amadeo P. Giannini and L. M. Giannini, and knowingly permitted by their co-defendant directors and officers, with the intent of each of them to enhance the respective personal and individual interests of the said defendants, Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased),

to the detriment of said defendant, Transamerica Corporation, and its shareholders.

With further respect to the payments and advancements of the funds and assets of defendant Transamerica Corporation to defendants Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), as heretofore set forth, and with respect to the payments and advancements of the funds and assets of defendant Transamerica Corporation to and into the treasury of the said Bankitaly Mortgage Company, as heretofore set forth, plaintiff alleges that the precise means and methods used to accomplish each and all of such payments and advancements were and are unknown to the plaintiff, but alleges that each and all of such transactions were not open, nor in the usual course of business, but on the other hand were consummated secretly by and through purported loans and other transactions with, to, by, and through secret dummy agents, representatives, corporations and associations of the defendants, Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), including one A. O. Stewart and A. P. Giannini Co., a corporation.

XXXIX.

During the year 1932, the precise date thereof being to the plaintiff unknown, defendants Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini (now deceased), for the purpose and with the intent of further secreting and concealing their respective interests in the ownership of the said

Bankitaly [43] Mortgage Company, mentioned in paragraph XXXV hereof, changed and altered its name to Pacific Coast Mortgage Company, mentioned in Paragraph II hereof, and thereafter during the years 1933, 1934, 1935, and 1936, by and through said corporation, operated and engaged in a business of speculating in the capital stock of defendant Transamerica Corporation by purchasing and selling the same upon the various stock exchanges of the United States, and that in and during said period of time, the precise days and dates thereof plaintiff being unable to state, said Pacific Coast Mortgage Company earned and collected a large and substantial profit, the precise amount of which being to plaintiff unknown, but aggregating a total of not less than approximately Two Million Dollars (\$2,000,000.00), which was from time to time paid to and received and accepted by said defendants, Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), by reason of which said defendants and said Virgil D. Giannini (now deceased) were, and each of them was, unjustly enriched to the detriment of defendant Transamerica Corporation and its shareholders in the sum and amount and to the extent of at least approximately Two Million Dollars (\$2,000,000.00), the precise sum and amount thereof being to plaintiff unknown.

XL.

In and during the years 1933, 1934, and 1935, the precise dates of which being to plaintiff unknown, defendants Amadeo P. Giannini and L. M.

Giannini caused, and their co-defendant directors and officers of defendant Transamerica Corporation knowingly permitted said defendant, Transamerica Corporation, to pay and advance from its funds and assets substantial sums of money, the precise amounts thereof being to plaintiff unknown, but aggregating a total of not less than approximately Three Million Dollars (\$3,000,000.00) to the said trustees, Charles J. Smith and Margaret Mallory, for use as [44] capital in operating and conducting the business and affairs of said private and secret trust syndicate, mentioned in paragraph XXXV hereof, and which was thereafter used by said trustees and said beneficiaries thereof for speculative operations in the purchase and sale of the capital stock of defendant Transamerica Corporation upon the various stock exchanges of the United States, in the particulars hereinafter set forth.

With respect to the payment and transfer of the funds and assets of defendant Transamerica Corporation to said trustees and into the treasury of said private and secret trust syndicate, as heretofore set forth, plaintiff alleges that the precise means and methods used to accomplish the same are unknown to the plaintiff, but that said transactions were not open nor in the usual course of business, but on the other hand, were consummated secretly by and through purported loans, and other transactions, with, to, by, and through secret dummy agents and representatives of said defendants, Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased).

With further respect to the payments and advancements of the funds and assets of defendant Transamerica Corporation to the said Charles J. Smith, and Margaret Mallory for use as capital in operating and conducting the business and affairs of said private and secret trust syndicate, plaintiff alleges that each and all of said payments and advances were caused to be made by said defendants, Amadeo P. Giannini and L. M. Giannini, and knowingly permitted by their co-defendant directors and officers, with the intent of each of them to enhance the respective personal and individual interests of defendants, Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), to the detriment of said defendant, Transamerica Corporation, and its shareholders.

XLI.

In and during the years 1933, 1934, and 1935, defendants [45] Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), by said secret, private trust syndicate, operated and engaged in a business of speculating in the capital stock of defendant Transamerica Corporation by purchasing and selling the same upon the various stock exchanges of the United States, and that in and during the said period, the precise days and dates thereof plaintiff being unable to state, the said trust syndicate earned and collected a large and substantial profit, the precise amount of which being to plaintiff unknown, but aggregating a total of not less than approximately Seventy-five Thous-

and Dollars (\$75,000.00), which was paid to and received and accepted by said defendants, Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), by reason of which said defendants and said Virgil D. Giannini (now deceased), were and each of them was unjustly enriched to the detriment of defendant Transamerica Corporation and its shareholders in the sum and amount and to the extent of at least approximately Seventy-five Thousand Dollars (\$75,000.00), the precise sum and amount thereof being to plaintiff unknown.

XLII.

In and during the years 1933, 1934, 1935 and 1936, the defendants, Amadeo P. Giannini and L. M. Giannini, in continuing their secret and private speculative operations in the purchase and sale of the capital stock of defendant Transamerica Corporation upon the various stock exchanges of the United States by and through the use of said Pacific Coast Mortgage Company, a corporation, and said Malloy-Smith trust syndicate, also caused the said Associated American Distributors, Inc., a corporation, formerly Intercoast Trading Company, a corporation, to engage, in part, in the business of soliciting orders from the general public for the purchase of capital stock of defendant, Transamerica Corporation, by and through defendant co-partnership, Walston & Co., upon the various stock exchanges of the United [46] States, with respect to which plaintiff further alleges that said Associated American

Distributors, Inc., incurred large items of expense and suffered substantial losses in the operation of such business, the precise days, dates and amounts thereof being unknown to plaintiff, but aggregating a total sum of not less than approximately Two Million Two Hundred Fifty Thousand Dollars (\$2,250,000.00), and from time to time in and during the years 1933, 1934, 1935, and 1936, the precise days and dates thereof plaintiff being unable to definitely state, the defendants Amadeo P. Giannini and L. M. Giannini caused, and their co-defendant officers and directors knowingly permitted, the funds and assets of the defendant Transamerica Corporation, in large sums and amounts, the precise extent thereof being unknown to plaintiff, but aggregating a total of not less than approximately Two Million Two Hundred Fifty Thousand Dollars (\$2,250,000.00), to be appropriated, taken, and used to replace the expense incurred and the losses suffered by said Associated American Distributors, Inc., aforesaid, by then and there and from time to time paying and disbursing the same from the funds and assets of defendant Transamerica Corporation to said Associated American Distributors, Inc.

With respect to the payments and advancements of the funds and assets of defendant Transamerica Corporation to the said Associated American Distributors, Inc., above set forth, plaintiff alleges that each and all thereof were caused by defendants Amadeo P. Giannini and L. M. Giannini, and knowingly permitted by their co-defendant directors and officers of defendant Transamerica Corporation, with

the intent of each of them to enhance the personal and individual interests of said defendants Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), to the detriment of said defendant, Transamerica Corporation, and its shareholders. [47]

XLIII.

Except as herein otherwise set forth, all of the matters, things, acts, and transactions mentioned and set forth in paragraphs XXXV, XXXVI, XXXVII, XXXVIII, XXXIX, XL, XLI and XLII relating to the Pacific Coast Mortgage Co., Associated American Distributors, Inc., and the Mallory-Smith trust syndicate, including the relationship to each thereof, of the defendants herein, Amadeo P. Giannini, L. M. Giannini, and Virgil D. Giannini (now deceased), and the account of their gains and profits therefrom were and each was at all times by said defendants and said Virgil D. Giannini (now deceased), withheld from the corporate records and books of account of defendant Transamerica Corporation, and do not appear therein; and the transfer and use of the corporate funds and assets of defendant Transamerica Corporation, as in said paragraphs of this complaint set forth, were upon the corporate records of said defendant corporation disguised, covered and concealed by false, fictitious, and misleading entries and records importing proper use and disposition thereof.

XLIV.

During all of the times mentioned herein the plaintiff had no knowledge, notice or information, of any

kind or character, with respect to any of the acts, matters, things, facts or transactions heretofore in this complaint set forth, or with respect to any irregularity or wrongful conduct of any kind or character of the defendants herein or any or either of them concerning their conduct in the operation of the assets or business or affairs of defendant Transamerica Corporation, but on the other hand, during all of such times, plaintiff had and reposed full and complete confidence in the integrity and good faith of defendant Amadeo P. Giannini and each and all of his co-defendant directors and officers of defendant Transamerica Corporation, [48] in the management, control and operation, of the assets, business and affairs thereof, until on or about the 27th day of April 1939, when, for the first time, it was called to plaintiff's attention that a certain contested quasi judicial proceeding then pending before the Securities and Exchange Commission of the United States involving an issue as to whether or not the defendant herein, Amadeo P. Giannini, had caused to be filed certain written statements, reports and other data, containing false and misleading information in support of certain applications for the registration of certain of the shares of the capital stock of Transamerica Corporation on various stock exchanges of the United States had developed certain evidence tending to establish suspicious circumstances indicating possible irregularities in the conduct of the business and affairs of said defendant, Transamerica Corporation, and by said defendant, Amadeo P. Giannini, and other defendant directors and officers

herein, and of which plaintiff had no prior notice, knowledge, or information of any kind or character whatsoever; and, with respect to such quasi judicial proceedings plaintiff further alleges that the said irregularities were therein developed only slowly by and through certain detailed examinations and audits of the corporate records and books of account of the defendant, Transamerica Corporation, and its many subsidiary corporations and associations, which were at all times maintained and kept in the manner set forth in paragraph XXX hereof, by expert accountants for and in behalf of said Commission, and were presented to said Commission through the testimony of unwilling and hostile witnesses as developed by experienced lawyers; and also concerning such quasi judicial proceedings plaintiff further alleges that the said issues therein are still being contested by the said defendant, Amadeo P. Giannini, and his associates therein, and that said controversy is still pending and undetermined. [49]

After being advised of the suspicious circumstances indicating possible irregularity in the conduct of the business and affairs of defendant, Transamerica Corporation, in the manner heretofore set forth, plaintiff not knowing the truth or falsity of such information and desiring to determine if actionable wrongs had in fact been committed in the management of the business and affairs of said defendant corporation, immediately proceeded to and has at all times ever since diligently investigated and attempted to ascertain the true and actual facts with respect to the transactions and wrongs herein

alleged, and thus far has been unable to fully complete her investigation, and is still proceeding therewith.

XLV.

Up to the time of the commencement of this action the great majority of the individual members of the board of directors and principal officers of defendant Transamerica Corporation continued to manage, control and operate, the business and affairs of said defendant corporation under the domination, control and direction, of the aforesaid defendants Amadeo P. Giannini and L. J. Giannini. The great majority of said members of said Board of Directors and said officers of said corporation are named and sued as defendants herein. With knowledge of such facts plaintiff has made no demand of said Board of Directors of said Transamerica Corporation to institute an action to redress the wrongs for which relief is sought herein, as such a suit to be effective and complete must be directed against them as such directors and officers, and such a demand by plaintiff as made would be and constitute a futile and idle act.

XLVI.

Plaintiff has no plain, speedy or adequate remedy at law. [50]

Wherefore, plaintiff prays for judgment and decree against the defendants, and each of them as follows:

(a) That a trust relationship between plaintiff and each of said defendants, and a trust relation-

ship between defendant Transamerica Corporation and said defendants be declared;

(b) That defendants, and each of them, render a complete true and correct, accounting of all their dealings and transactions with the assets, business and affairs, of defendant Transamerica Corporation, and all of their corporate acts and conduct as members of the Board of Directors and officers thereof concerning all of the transactions for which relief is sought herein;

(c) That upon such complete, true and correct accounting the court make and enter judgment and decree for plaintiff against said defendants, and each of them, in such sums and amounts to which plaintiff and the defendant Transamerica may be entitled under the law and evidence, amounting in all to a sum not less than Ten Million Dollars (\$10,000,000.00) with proper legal interest thereon;

(d) For costs and expenses incurred by the plaintiff in the prosecution of this action, and an allowance of a reasonable sum to be awarded to plaintiff's counsel as a fee for their services herein;

(e) And for such other and further equitable relief to which the plaintiff may be entitled under the pleadings and evidence herein.

VINCENT A. MARCO

PERCY V. CLIBBORN

HOMER N. BOARDMAN

JOSEPH A. RUSKAY

By VINCENT A. MARCO

Attorneys for Plaintiff [51]

State of New York,
County of Bronx—ss.

Rose Papantonio, being duly sworn, deposes and says she is the plaintiff in the within action; that she has read the foregoing complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

ROSE PAPANTONIO

Sworn to before me this 23rd day of December, 1941.

[Seal]

EDWARD PAPANTONIO

Notary Public, Bronx County. Bronx Co. Clk's No. 130, Reg. No. 131P43. N. Y. Co. Clk's No. 705, Reg. No. 3P432. Comm. expires March 30, 1943.

Form No. 1

No. 32564

State of New York,
County of Bronx—ss.

I, Michael B. McHugh, Clerk of the County of Bronx (and Clerk of the Supreme Court of said County, and Clerk of the County Court for said County, the same being Courts of Record, having by law a seal), Do Hereby Certify That Edward Papantonio whose name is subscribed to the certificate of acknowledgment, proof affidavit or deposition of the annexed instrument and thereon written, was on the day of the date thereof a Notary Public

within and for, and residing in said County, duly commissioned, qualified and sworn, having full power and authority by the laws of said State to take the acknowledgments of deeds or conveyances for lands, tenements and hereditaments in said State, and certify to same; also to administer oaths, to take depositions out of court, and to give certificates thereof; that full faith and credit may, and ought to be given to his official acts and attestations; that I have compared the signature on file in this office and verily believe that the signature of said certificate of acknowledgment, proof, affidavit or deposition, is his genuine official signature as appears by the records of this office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, this 23 day of Dec., 1941.

MICHAEL B. McHUGH

[Seal]

Clerk

[Endorsed]: Filed Dec. 29, 1941. [52]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANT AMADEO P. GIANNINI, INDIVIDUALLY AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF VIRGIL D. GIANNINI, DECEASED,

- (1) TO DISMISS THE ACTION;
- (2) FOR AN ORDER REQUIRING PLAINTIFF TO SEPARATELY STATE CAUSES OF ACTION IN SEPARATE COUNTS;
- (3) FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS, AND
- (4) TO STRIKE.

Defendant Amadeo P. Giannini, individually, defendant Amadeo P. Giannini, as an alleged co-partner of defendant Walston & Co., defendant Amadeo P. Giannini, as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased, and defendant Amadeo P. Giannini, as the Executor of the Last Will [53] and Testament of Virgil D. Giannini, a deceased alleged member of said co-partnership, moves the court severally in each of the various capacities in which he is sued, as follows:

MOTION TO DISMISS

I. To dismiss the action because the First Amended Complaint fails to state a claim against defendant upon which relief can be granted.

MOTION FOR SEPARATE STATEMENT

II. For an order requiring plaintiff to state in separate counts the claims founded upon the following separate transactions:

First. The transaction, the gist of which appears in paragraphs XXII to XXX, inclusive, and in which it is alleged that defendant Amadeo P. Giannini, individually, received from defendant Transamerica Corporation and its predecessor, Bancitaly Corporation, the sum of approximately \$5,000,000.00 under a salary agreement between defendant Amadeo P. Giannini and Bancitaly Corporation and assumed by defendant Transamerica Corporation, that said salary agreement was ultra vires as to Bancitaly Corporation, that it was made and assumed by the respective Boards of Directors acting under the domination of defendant Amadeo P. Giannini, that the payments made were computed upon false and fictitious profits, and that no consideration was given by defendant Amadeo P. Giannini.

Second. The transaction, the gist of which appears in paragraphs XXXI to XXXIV, inclusive, and in which it is alleged that defendant Amadeo P. Giannini and another caused defendant Transamerica Corporation unnecessarily to pay to defendant Walston & Co., a co-partnership, the sum of approximately \$500,000.00 as brokerage fees and for use as capital, which money was paid and distributed by said co-partnership to the alleged partners thereof, including defendant Amadeo P. Giannini and said [54] Virgil D. Giannini, deceased.

Third. The transaction, the gist of which appears in paragraphs XXXV to XLIII, inclusive, and in respect to which it is alleged that defendant Amadeo P. Giannini and said Virgil D. Giannini, deceased, and others received substantial sums as profits from speculations carried on through Bank-Italy Mortgage Company, later Pacific Coast Mortgage Company, and a trust syndicate described as the "Mallory-Smith Trust Syndicate" in the aiding and abetting of which Associated American Distributors, Inc. incurred losses of approximately \$2,250,000.00, which losses defendant Amadeo P. Giannini and another caused defendant Transamerica Corporation to reimburse said Associated American Distributors, Inc.

This motion is made upon the ground that the First Amended Complaint unites and does not state in separate counts the several claims founded upon separate transactions or occurrences, in violation of the provisions of paragraph (b) of Rule 10 of the Federal Rules of Civil Procedure; that the defendants involved in said first transaction are not the same as the defendants involved in said second transaction or in said third transaction; that the defendants involved in said third transaction are not the same as the defendants involved in said second transaction; that plaintiff's alleged right to recover in behalf of Transamerica is based upon separate and different theories upon each of said three transactions; that a statement in separate counts of said three transactions will facilitate the clear presentation of the matters set forth,

and that such a separate statement will facilitate the presentation of the special defenses thereto of defendant Amadeo P. Giannini in the several capacities in which he is sued. [55]

MOTION FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

III. For an order requiring plaintiff to make a more definite statement of, or a bill of particulars in respect to, the following matters, as to each of which defendant desires more definite particulars and in respect to each of which the First Amended Complaint is defective. Items 7, 8, 9 and 10 hereinafter set forth, as noted therein, involve allegations which defendant seeks to have stricken in his Motion to Strike (post). In respect to Items 7, 8, 9 and 10, this motion is made in the alternative and without prejudice to the Motion to Strike.

1. What is the number of shares of capital stock of defendant Transamerica Corporation of which plaintiff is the holder, as alleged in paragraph III (p. 3, lines 17-21), and what was the total number of issued and outstanding shares of capital stock of Transamerica Corporation on the date of the commencement of this action.

2. Whether plaintiff has been a shareholder of Transamerica only since on or about March 7, 1929, as alleged in paragraph III (p. 3, lines 17-21), or whether, as alleged in paragraph XIX (p. 6, lines 25-27), she was a shareholder of said defendant at the time of each and all of the transactions of which she complains, that is to say, including the matters

complained of in paragraphs XXII to XXIX, inclusive (p. 10, line 10 to p. 16, line 19), some of which are there alleged to have occurred at dates prior to October 11, 1928, the date upon which Transamerica Corporation was organized, as alleged in paragraph I (p. 2, line 21) and before March 7, 1929.

3. What was the extent of the ownership of stock of defendant Transamerica Corporation of defendants Amadeo P. Giannini and L. M. Giannini, and John M. Grant, deceased, as alleged in [56] paragraph XXI (p. 9, lines 18-20), and what were the periods of time during which such shares were held.

4. What was the extent and number of shares of stock of defendant Transamerica Corporation as to which defendants Amadeo P. Giannini and L. M. Giannini held proxies, as alleged in paragraph XXI (p. 9, lines 18-20), and what were the periods of time during which such proxies were held.

5. What were the "various means and devices" by which it is alleged in paragraph XXI (p. 9, lines 18-25) defendant Amadeo P. Giannini and others selected and named the officers and members of the Board of Directors of defendant Transamerica Corporation and controlled and dominated and determined its entire business policies and affairs.

6. Whether the members of the Board of Directors of defendant Transamerica, alleged in paragraph XXI (p. 9, line 18 to p. 10, line 8) to have been controlled and dominated and not to have exercised any independent judgment in the per-

formance of their duties, at all times constituted a majority of the members of said Board of Directors, and if not at all times, then at what times.

7. [As an alternative to the Motion to Strike (post), Item 1] Wherein and in what manner and by reason of what facts did each director of Bancitaly Corporation, other than defendant Amadeo P. Giannini, become and remain the dummy agent and alter ego of said defendant, as alleged in paragraph XXIII (p. 11, lines 7-8).

8. [As an alternative to the Motion to Strike (post), Item 2] Wherein and in what manner was the salary agreement beyond the scope of the corporate powers of Bancitaly Corporation and in excess of the authority of its officials and Board of Directors, as alleged in paragraph XXIV (p. 11, lines 23-26). [57]

9. [As an alternative to the Motion to Strike (post), Item 3] To what extent were the credit items referred to in paragraph XXV (p. 12, lines 3-18) in excess of five per cent of the actual and true net profits of Bancitaly Corporation, as also alleged in said paragraph (p. 12, lines 19-28).

10. [As an alternative to the Motion to Strike (post), Item 3] Of what did the false, fictitious, inflated and untrue book profits, alleged in paragraph XXV (p. 12, lines 28-29), consist; what was the extent thereof; and what is meant by the words "book profits".

11. Which of the entries alleged in paragraph XXVII (p. 13, lines 25-26) were made prior to

March 7, 1929, the date upon which plaintiff became a stockholder of defendant Transamerica Corporation, what was the period of time to which the entries related, and what was the date and amount of each of such entries.

12. What were the dates and amounts of the several items and entries made in the corporate records and books of defendant Transamerica Corporation, as alleged in paragraph XXVII (p. 14, lines 3-12), and of the net profits of what period of time did such entries purport to be five per cent.

13. To what extent were the credit items, referred to in paragraph XXVII (p. 14, lines 3-12), in excess of five per cent of the actual and true net profits of Transamerica Corporation, as also alleged in paragraph XXVII (p. 14, lines 18-21).

14. Of what did the false, fictitious, inflated and untrue book profits alleged in paragraph XXVII (p. 14, lines 22-23) consist; what was the extent thereof; and what is meant by the words "book profits".

15. Whether, as alleged in paragraph XXVIII (p. 15, lines 2-14), sums purportedly payable to defendant Amadeo P. Giannini under said salary agreement "were by him unearned, and for which he gave no consideration" (p. 15, lines 11-12), or whether, as alleged in paragraph XXI (p. 9, lines 18-25), during all of the [58] times covered by said salary agreement since the incorporation of Transamerica Corporation defendant Amadeo P. Giannini controlled and determined its entire business policies and affairs.

16. How and in what manner did the credits referred to in paragraph XXVIII (p. 15, lines 2-14) constitute unauthorized and illegal corporate liabilities of Transamerica Corporation as in said paragraph alleged.

17. What were the date or dates and the amount or amounts in which payments were made to defendant Amadeo P. Giannini during the years 1927 to 1931, inclusive, as alleged in paragraph XXIX (p. 15, lines 16-24); which of said payments were made before October 11, 1928, the date upon which defendant Transamerica Corporation was organized (p. 2, line 21), and which were made before March 7, 1929, the date upon which plaintiff became a shareholder of defendant Transamerica Corporation, as alleged in paragraph III (p. 2, line 18).

18. What were the false, misleading and untrue names and designations under which payments and disbursements to defendant Amadeo P. Giannini are alleged in paragraph XXX (p. 17, lines 4-10) to have been covered, disguised and concealed.

19. What were the dates in 1932, 1933, 1934, 1935, 1936, 1937, and 1938, upon which Transamerica paid brokerage fees to defendant Walston & Co., as alleged in paragraph XXXIII (p. 18, lines 24-32); what was the amount of each payment; and were such fees the regular and usual fees.

20. What was the date and amount of each sum of money paid by Transamerica Corporation to Walston & Co. for use as capital and for other purposes, as alleged in said paragraph XXXIII (p. 19, lines 1-2).

21. How and in what manner were defendants Amadeo P. Giannini or his testator Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its [59] shareholders, as alleged in paragraph XXXIII (p. 19, lines 14-21).

22. What was the private and confidential knowledge and information, acquired by defendants Amadeo P. Giannini and L. M. Giannini in their capacity as officers and directors of defendant Transamerica Corporation and used for speculative operations, as alleged in paragraph XXXVII (p. 22, lines 2-8).

23. What means and methods were used to accomplish the payments and advances from Transamerica Corporation to Bankitaly Mortgage Company, as alleged in paragraph XXXVIII (p. 22, line 10 to p. 23, line 2).

24. How and in what manner were Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XXXIX (p. 24, lines 17-20).

25. How and in what manner were Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its

shareholders, as alleged in paragraph XLI (p. 26, lines 14-18).

26. Who is Associated American Distributors, Inc. mentioned in paragraph XLII (p. 26, line 28; p. 27, lines 2, 20-21 and 24) and paragraph XLIII (p. 28, lines 5-6), and what was its relationship, if any, to defendant Transamerica Corporation.

27. What were the dates and amounts of the losses of Associated American Distributors, Inc., alleged in paragraph XLII (p. 27, lines 2-3).

28. What were the dates and amounts of the payments by defendant Transamerica Corporation to Associated American Distributors, Inc., alleged in paragraph XLII (p. 27, lines 7-8). [60]

29. What were the false, fictitious and misleading entries and records by which the transfer and use of funds of Transamerica Corporation were disguised, covered and concealed, as alleged in paragraph XLIII (p. 28, lines 17-18).

The foregoing motion will be made upon the ground that the First Amended Complaint lacks definiteness in the particulars specified and is defective in that regard, and that the details desired by defendant are necessary to enable him properly to prepare his responsive pleadings and to prepare for trial.

MOTION TO STRIKE

IV. For an order striking the following matters from the First Amended Complaint:

1. The language appearing in paragraph XXIII of said complaint, at page 11, lines 5 to 11, inclusive, reading as follows:

“and the remaining members of the Board of Directors and other officials of said corporation were, and each of them was, at all such times a dummy agent and alter ego of said defendant Amadeo P. Giannini, and as such controlled and dominated by him for the purpose of enhancing his own personal and individual interests to the detriment of said corporation and its shareholders in the particulars herein-after mentioned.”

2. The language appearing in paragraph XXIV of said complaint, at page 11, line 23 to page 12, line 1, reading as follows:

“Plaintiff alleges that the execution and making of said salary agreement was beyond the scope of the corporate powers of said Bancitaly Corporation, and in excess of the authority of its officials and [61] Board of Directors, and was caused to be made by said Amadeo P. Giannini, and knowingly permitted by the remaining members of the Board of Directors and other officials of said Bancitaly Corporation, each and all of whom intended thereby to enhance the personal and individual interests of and unjustly enrich the said defendant Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned.”

3. The language appearing in paragraph XXV of said complaint, at page 12, line 19 to page 13, line 5, reading as follows:

“Plaintiff further alleges with respect to the said entries and records, aforesaid, that the total credit and each item thereof so entered and recorded upon the corporate records and books of account of said Bancitaly Corporation in favor of said defendant, Amadeo P. Giannini, was and is false and untrue, in that the same does not truly and correctly represent five per cent (5%) of the actual and true net profits of said corporation for said period or any part thereof, but on the other hand was and is in excess thereof, and by said defendant and said directors and officers knowingly computed upon false, fictitious, inflated and untrue book profits, the precise extent thereof being to plaintiff unknown, and all of which was so caused to be done by said defendant, Amadeo P. Giannini, and knowingly permitted by the remaining members of the Board of Directors and other officials of said Bancitaly Corporation, with the intent of each of them to thereby enhance the personal and individual interests of and unjustly enrich the [62] said defendant, Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned.”

Said motion will be made upon the ground that

the matters above specified are redundant, immaterial and impertinent.

COSGROVE & O'NEIL

T. B. COSGROVE

F. J. O'NEIL

JOHN N. CRAMER

By JOHN N. CRAMER

Attorneys for Defendant Amadeo P. Giannini, Individually
and in all of the Capacities in
Which he is Sued.

The address of said attorneys for Amadeo P. Giannini is:

1031 Rowan Building,
458 South Spring Street,
Los Angeles, California.

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq., Homer N. Boardman, Esq., and Joseph A. Ruskay, Esq., Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before this Court (Honorable Harry A. Hollzer, District Judge) at Court Room No. 2, Post Office and Federal Courts Building, City of Los Angeles, California, on the 21st day of May, 1942, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard. [63]

You Will Further Take Notice that all of said motions will be made upon the files and records herein, including the First Amended Complaint, said motions and this notice, and, in addition, the motion for order requiring plaintiff separately to state the several causes of action will also be made upon the affidavit of John N. Cramer herewith served upon you.

Please Take Further Notice that defendant Amadeo P. Giannini will rely upon points and authorities in support of said motions, a copy of which is herewith served upon you.

COSGROVE & O'NEIL

T. B. COSGROVE

F. J. O'NEIL

JOHN N. CRAMER

By JOHN N. CRAMER

Attorneys for Defendant

AMADEO P. GIANNINI

1031 Rowan Building,

458 South Spring Street,

Los Angeles, California.

By The Court:

The date of the hearing of the above Motions, to wit, May 21, 1942, at 10:00 o'clock, A. M. is approved.

April 29, 1942.

H. A. HOLLZER

District Judge [64]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN N. CRAMER IN SUPPORT OF MOTION OF DEFENDANT AMADEO P. GIANNINI, INDIVIDUALLY AND IN THE SEVERAL CAPACITIES IN WHICH HE IS SUED HEREIN, FOR SEPARATE STATEMENT OF CAUSES OF ACTION

State of California,
County of Los Angeles—ss.

John N. Cramer, being first duly sworn, on oath deposes and says:

1. Affiant is an attorney at law duly admitted to practice before this court and the courts of the State of California, and is one of the attorneys of record for defendant Amadeo P. Giannini, individually and in each of the capacities in which he is sued in the First Amended Complaint herein.

2. On or about December 29, 1938, one Rose Breakstone, alleging herself to be a stockholder of defendant herein, Transamerica Corporation, commenced an action in the Superior Court of the State of California in and for the County of Los Angeles, entitled, "Rose Breakstone, suing on behalf of herself and all other stockholders of Transamerica Corporation, Plaintiff v. Amadeo P. Giannini, et al., Defendants", and numbered 435131 in the files of said Superior Court. Said action is now pending and undetermined in said Superior Court upon the demurrer of [65] defendant therein Amadeo P. Giannini to plaintiff's Fourth Amended Complaint and his motion to strike therefrom. Said

demurrer was orally argued in behalf of said defendant Amadeo P. Giannini and by counsel for plaintiff therein, and written Points and Authorities and a written brief were submitted in behalf of said defendant. The matter was taken under submission by the court and neither the demurrer nor the motion to strike has been decided.

3. In and by said Fourth Amended Complaint plaintiff seeks to recover in behalf of defendant Transamerica Corporation from defendant Amadeo P. Giannini and certain other defendants the sum of \$778,470.42, alleged to have been paid to defendant Giannini during the years 1932 to 1938, inclusive. Such recovery is sought upon the same transaction alleged and set forth in paragraphs XXII to XXX, both inclusive, in the First Amended Complaint herein.

4. Affiant has discussed this situation with his co-counsel herein, Messrs. T. B. Cosgrove and F. J. O'Neil, and has arrived at the conclusion that if defendant Amadeo P. Giannini is required to file an answer herein he should interpose a plea of another action pending, to wit, said action No. 435131, primarily as a plea in abatement to the claim of plaintiff, the gist of which is alleged in paragraphs XXII to XXX, both inclusive, of the First Amended Complaint herein.

JOHN N. CRAMER

Subscribed and sworn to before me this 30th day of April, 1942.

MARY IVES ANDERSON

[Seal]

Notary Public in and for the
County of Los Angeles,
State of California [66]

Receipt of a copy of the within is hereby admitted this 30th day of April 1942.

VINCENT A. MARCO,
PERCY V. CLIBBORN,
HOMER N. BOARDMAN,
JOSEPH A. RUSKAY

By PERCY V. CLIBBORN
Attorneys for Plaintiff.

[Endorsed]: Filed April 30, 1942. [67]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANT
HERBERT E. WHITE

- (1) TO DISMISS THE ACTION;
- (2) FOR AN ORDER REQUIRING PLAINTIFF TO SEPARATELY STATE CAUSES OF ACTION IN SEPARATE COUNTS;
- (3) FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS, AND
- (4) TO STRIKE.

MOTION TO DISMISS

I (a) To dismiss the action because the First Amended Complaint fails to state a claim upon which relief can be granted.

(b) To dismiss the action as to this defendant because the First Amended Complaint fails to state a claim against this defendant upon which relief can be granted. [68]

MOTION FOR SEPARATE STATEMENT

II. For an order requiring plaintiff to state in separate counts the claims founded upon the following separate transactions:

First. The transaction, the gist of which appears in paragraphs XXII to XXX, inclusive, and in which it is alleged that defendant Amadeo P. Gianini, individually, received from defendant Transamerica Corporation and its predecessor, Bancitaly Corporation, the sum of approximately \$5,000,000.00

under a salary agreement between defendant Amadeo P. Giannini and Bancitaly Corporation and assumed by defendant Transamerica Corporation, that said salary agreement was ultra vires as to Bancitaly Corporation, that it was made and assumed by the respective Boards of Directors acting under the domination of defendant Amadeo P. Giannini, that the payments made were computed upon false and fictitious profits, and that no consideration was given by defendant Amadeo P. Giannini.

Second. The transaction, the gist of which appears in paragraphs XXXI to XXXIV, inclusive, and in which it is alleged that defendant Amadeo P. Giannini and another caused defendant Transamerica Corporation unnecessarily to pay to defendant Walston & Co., a co-partnership, the sum of approximately \$500,000.00 as brokerage fees and for use as capital, which money was paid and distributed by said co-partnership to the alleged partners thereof, including defendant Amadeo P. Giannini and said Virgil D. Giannini, deceased.

Third. The transaction, the gist of which appears in paragraphs XXXV to XLIII, inclusive, and in respect to which it is alleged that defendant Amadeo P. Giannini and said Virgil D. Giannini, deceased, and others received substantial sums as profits from speculations carried on through Bancitaly Mortgage Company, later Pacific Coast Mortgage Company, and a trust syndicate described as the "Mallory-Smith Trust Syndicate" in the aiding and [69] abetting of which Associated American

Distributors, Inc., incurred losses of approximately \$2,250,000.00, which losses defendant Amadeo P. Giannini and another caused defendant Trans-america Corporation to reimburse said Associated American Distributors, Inc.

This motion is made upon the ground that the First Amended Complaint unites and does not state in separate counts the several claims founded upon separate transactions or occurrences, in violation of the provisions of paragraph (b) of Rule 10 of the Federal Rules of Civil Procedure; that the defendants involved in said first transaction are not the same as the defendants involved in said second transaction or in said third transaction; that the defendants involved in said third transaction are not the same as the defendants involved in said second transaction; that plaintiff's alleged right to recover in behalf of Transamerica is based upon separate and different theories upon each of said three transactions; that a statement in separate counts of said three transactions will facilitate the clear presentation of the matters set forth, and that such a separate statement will facilitate the presentation of the special defenses thereto of defendant Herbert E. White.

MOTION FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

III. For an order requiring plaintiff to make a more definite statement of, or a bill of particulars in respect to, the following matters, as to each of which defendant desires more definite particulars

and in respect to each of which the First Amended Complaint is defective. Items 7, 8, 9, 10, 32 and 33, hereinafter set forth, as noted therein, involve allegations which defendant seeks to have stricken in his Motion to Strike (post). In respect to Items 7, 8, 9, 10, 32 and 33, this motion is made in the alternative and without prejudice to the Motion to Strike.

1. What is the number of shares of capital stock of defendant Transamerica Corporation of which plaintiff is the holder, [70] as alleged in paragraph III (p. 3, lines 17-21), and what was the total number of issued and outstanding shares of capital stock of Transamerica Corporation on the date of the commencement of this action.

2. Whether plaintiff has been a shareholder of Transamerica only since on or about March 7, 1929, as alleged in paragraph III (p. 3, lines 17-21), or whether, as alleged in paragraph XIX (p. 6, lines 25-27), she was a shareholder of said defendant at the time of each and all of the transactions of which she complains, that is to say, including the matters complained of in paragraphs XXII to XXIX, inclusive (p. 10, line 10 to p. 16, line 19), some of which are there alleged to have occurred at dates prior to October 11, 1928, the date upon which Transamerica Corporation was organized, as alleged in paragraph I (p. 2, line 21) and before March 7, 1929.

3. What was the extent of the ownership of stock of defendant Transamerica Corporation of defendants Amadeo P. Giannini and L. M. Giannini, and John M. Grant, deceased, as alleged in para-

graph XXI (p. 9, lines 18-20), and what were the periods of time during which such shares were held.

4. What was the extent and number of shares of stock of defendant Transamerica Corporation as to which defendants Amadeo P. Giannini and L. M. Giannini held proxies, as alleged in paragraph XXI (p.9, lines 18-20), and what were the periods of time during which such proxies were held.

5. What were the "various means and devices" by which it is alleged in paragraph XXI (p.9, lines 18-25) defendant Amadeo P. Giannini and others selected and named the officers and members of the Board of Directors of defendant Transamerica Corporation and controlled and dominated and determined its entire business policies and affairs.

6. Whether the members of the Board of Directors of [71] defendant Transamerica, alleged in paragraph XXI (p.9, line 18 to p.10, line 8) to have been controlled and dominated and not to have exercised any independent judgment in the performance of their duties, at all times constituted a majority of the members of said Board of Directors; and if not at all times, then at what times.

7. (As an alternative to the Motion to Strike (post), Item 1) Wherein and in what manner and by reason of what facts did each director of Bancitaly Corporation, other than defendant Amadeo P. Giannini, become and remain the dummy agent and alter ego of said defendant, as alleged in paragraph XXIII (p.11, lines 7-8).

8. (As an alternative to the Motion to Strike (post), Item 2) Wherein and in what manner was

the salary agreement beyond the scope of the corporate powers of Bancitaly Corporation and in excess of the authority of its officials and Board of Directors, as alleged in paragraph XXIV (p.11, lines 23-26).

9. (As an alternative to the Motion to Strike (post), Item 3) To what extent were the credit items referred to in paragraph XXV (p.12, lines 3-18) in excess of five per cent of the actual and true net profits of Bancitaly Corporation, as also alleged in said paragraph (p.12, lines 19-28).

10. (As an alternative to the Motion to Strike (post), Item 3) Of what did the false, fictitious, inflated and untrue book profits, alleged in paragraph XXV (p.12, lines 28 and 29), consist, and what was the extent thereof.

11. Which of the entries alleged in paragraph XXVII (p.13, lines 25-26) were made prior to March 7, 1929, the date upon which plaintiff became a stockholder of defendant Transamerica Corporation, what was the period of time to which the entries related, and what was the date and amount of each of such entries.

12. What were the dates and amounts of the several items and entries made in the corporate records and books of [72] defendant Transamerica Corporation, as alleged in paragraph XXVII (p.14, lines 3-12), and of the net profits of what period of time did such entries purport to be five per cent.

13. To what extent were the credit items, referred to in paragraph XXVII (p.14, lines 3-12), in excess of five per cent of the actual and true net

profits of Transamerica Corporation, as also alleged in paragraph XXVII (p.14, lines 18-21).

14. Of what did the false, fictitious, inflated and untrue book profits alleged in paragraph XXVII (p. 14, lines 22-23) consist, and what was the extent thereof.

15. Whether, as alleged in paragraph XXVIII (p.15, lines 2-14), sums purportedly payable to defendant Amadeo P. Giannini under said salary agreement "were by him unearned, and for which he gave no consideration" (p. 16, lines 11-12), or whether, as alleged in paragraph XXI (p.9, lines 18-25), during all of the times covered by said salary agreement since the incorporation of Transamerica Corporation defendant Amadeo P. Giannini controlled and determined its entire business policies and affairs.

16. How and in what manner did the credits referred to in paragraph XXVIII (p.15, lines 2-14) constitute unauthorized and illegal corporate liabilities of Transamerica Corporation as in said paragraph alleged.

17. What were the date or dates and the amount or amounts in which payments were made to defendant Amadeo P. Giannini during the years 1927 to 1931, inclusive, as alleged in paragraph XXIX (p.15, lines 16-24); which of said payments were made before October 11, 1928, the date upon which defendant Transamerica Corporation was organized (p.2, line 21), and which were made before March 7, 1929, the date upon which plaintiff became a shareholder of defendant Transamerica Cor-

poration, as inferentially alleged in paragraph III (p.2, line 18). [73]

18. What were the false, misleading and untrue names and designations under which payments and disbursements to defendant Amadeo P. Giannini are alleged in paragraph XXX (p.17, lines 4-10) to have been covered, disguised and concealed.

19. What were the dates in 1932, 1933, 1934, 1935, 1936, 1937, and 1938, upon which Transamerica paid brokerage fees to defendant Walston & Co., as alleged in paragraph XXXIII (p.18, line 24-32), and what was the amount of each payment; and were such fees the regular and usual fees.

20. What was the date and amount of each sum of money paid by Transamerica Corporation to Walston & Co., for use as capital and for other purposes, as alleged in said paragraph XXXIII (p.19, lines 1-2).

21. How and in what manner were defendants Amadeo P. Giannini or his testator, Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XXXIII (p.19, lines 14-21).

22. What was the private and confidential knowledge and information, acquired by defendants Amadeo P. Giannini and L. M. Giannini in their capacity as officers and directors of defendant Transamerica Corporation and used for speculative operations, as alleged in paragraph XXXVII (p.22, lines 2-8),

and of what part thereof did defendant White have knowledge or give consent.

23. What means and methods were used to accomplish the payments and advances from Transamerica Corporation to Bankitaly Mortgage Company, as alleged in paragraph XXXVIII (p.22, line 10 to p.23, line 2).

24. How and in what manner were Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XXXIX (p. 24, lines 17-20). [74]

25. How and in what manner were Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XLI (p.26, lines 14-18).

26. Who is Associated American Distributors, Inc., mentioned in paragraph XLII (p.26, line 28; p.27, lines 2, 21-21 and 24) and paragraph XLIII (p.28, lines 5-6), and what was its relationship, if any, to defendant Transamerica Corporation.

27. What were the dates and amounts of the losses of Associated American Distributors, Inc., alleged in paragraph XLII (p.27, lines 2-3).

28. What were the dates and amounts of the payments by defendant Transamerica Corporation

to Associated American Distributors, Inc., alleged in paragraph XLII (p.27, lines 7-8).

29. What were the false, fictitious and misleading entries and records by which the transfer and use of funds of Transamerica Corporation were disguised, covered and concealed, as alleged in paragraph XLIII (p.28, lines 17-18).

30. What loss, if any, did Transamerica Corporation suffer by paying brokerage fees to Walston & Co., as alleged in paragraph XXX (p.18, lines 24-32).

31. What brokerage business was diverted to Walston & Co., which belonged to Transamerica Corporation, as alleged in paragraph XXX (p.18, lines 24-32).

32. How or in what manner defendant White could have or did knowingly or otherwise permit Transamerica Corporation to pay to defendant Amadeo P. Giannini on account of or by reason of unlawful credits or otherwise substantial or any sums of money aggregating \$5,000,000.00, or any other sum, as set forth in paragraph XXIX (p.15, line 16, to p.16, line 19); nor how defendant White could have or did permit the payment of any sums by [75] Transamerica Corporation to Amadeo P. Giannini before defendant White became a director (p.19, line 32), as alleged in paragraph XX (p.8, line 14).

33. At what date or dates during the year 1932 were the sums of money referred to in paragraph XXXVIII (p.22 line 10 to p.23 line 26) made by defendant Transamerica Corporation and whether

said payments were made before March 31, 1922, when defendant White became a director of said Transamerica Corporation.

The foregoing motion will be made upon the ground that the First Amended Complaint lacks definiteness in the particulars specified and is defective in that regard, and that the details desired by defendant are necessary to enable this defendant properly to prepare his responsive pleadings and to prepare for trial.

MOTION TO STRIKE

IV. For an order striking the following matters from the First Amended Complaint:

1. The language appearing in paragraph XXIII of said complaint, at page 11, lines 5 to 11, inclusive, reading as follows:

“and the remaining members of the Board of Directors and other officials of said corporation were, and each of them was, at all such times a dummy agent and alter ego of said defendant Amadeo P. Giannini, and as such controlled and dominated by him for the purpose of enhancing his own personal and individual interests to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned.”

2. The language appearing in paragraph XXIV of said complaint, at page 11, line 23 to page 12, line 1, reading as follows: [76]

“Plaintiff alleges that the execution and mak-

ing of said salary agreement was beyond the scope of the corporate powers of said Bancitaly Corporation, and in excess of the authority of its officials and Board of Directors, and was caused to be made by said Amadeo P. Giannini, and knowingly permitted by the remaining members of the Board of Directors and other officials of said Bancitaly Corporation, each and all of whom intended thereby to enhance the personal and individual interests of and unjustly enrich the said defendant Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars herein-after mentioned."

3. The language appearing in paragraph XXV of said complaint, at page 12, line 19 to page 13, line 5, residing as follows:

"Plaintiff further alleges with respect to the said entries and records, aforesaid, that the total credit and each item thereof so entered and recorded upon the corporate records and books of account of said Bancitaly Corporation in favor of said defendant, Amadeo P. Giannini, was and is false and untrue, in that the same does not truly and correctly represent five per cent (5%) of the actual and true net profits of said corporation for said period or any part thereof, but on the other hand was and is in excess thereof, and by said defendant and said directors and officers knowingly computed upon false, fictitious, inflated and untrue

book profits, the precise extent thereof being to plaintiff unknown, and all of which was so caused to be done by said defendant, Amadeo P. Giannini, and knowingly permitted by the remaining [77] members of the Board of Directors and other officials of said Bancitaly Corporation, with the intent of each of them to thereby enhance the personal and individual interests of and unjustly enrich the said defendant, Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned."

4. All of paragraphs XXII, XXIII, XXIV, XXV, XXVI, XXVII and XXVIII (p.10, line 10 to p.15, line 14), each of the same having reference to the organization of Bancitaly Corporation and its transactions with Amadeo P. Giannini prior to the time this defendant became a director, as alleged on page 8, line 14.

Said motion will be made upon the ground that the matters above specified are redundant, immaterial and impertinent.

TANNER, ODELL & TAFT
By ROBERT A. ODELL
Attorneys for Defendant
HERBERT E. WHITE.

The address of said attorneys for Herbert E. White is:

1011 Van Nuys Building,
210 West Seventh St.,
Los Angeles, Cal.

NOTICE OF MOTION

To: Vincent A. Marco, Esq., Percy V. Clibborn, Esq., Homer N. Boardman, Esq., and Joseph A. Ruskay, Esq., Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before this Court (Honorable Harry A. Hollzer, District Judge) at Court Room No. 2, Post Office and Federal Courts Building, City of Los Angeles, California, on the [78] 21st day of May, 1942, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

You Will Further Take Notice that all of said motions will be made upon the files and records herein, including the First Amended Complaint, said motions and this notice.

Please Take Further Notice that defendant Herbert E. White will rely upon points and authorities in support of said motions, a copy of which is herewith served upon you.

TANNER, ODELL & TAFT
ROBERT A. ODELL

Attorneys for Defendant
HERBERT E. WHITE.

1011 Van Nuys Bldg.,
210 W. 7th St.,
Los Angeles, Calif. [79]

Received copy of the within Motions etc. this
30th day of April, 1942.

VINCENT A. MARCO,
PERCY V. CLIBBORN,
HOMER N. BOARDMAN, and
JOSEPH A. RUSKAY,
By PERCY V. CLIBBORN,
Attorney for Plaintiff.

[Endorsed]: Filed April 30, 1942. [80]

[Title of District Court and Cause.]

NOTICE OF MOTIONS BY DEFENDANTS
WALSTON & CO., A COPARTNERSHIP
AND CHARLES de Y. ELKUS, WILLIAM
S. HOELSCHER, CLIFFORD P. HOFF-
MAN, C. J. SMITH, VERNON C. WALSTON
AND CLAIRE GIANNINI HOFFMAN
TRANSACTING BUSINESS AS COPART-
NERS UNDER THE FIRM NAME AND
STYLE OF WALSTON & CO.

To Vincent A. Marco, Esq., Percy V. Clibborn,
Esq., Homer N. Boardman, Esq., and Joseph
A. Ruskay, Esq., attorneys for plaintiff:

Please Take Notice that upon the complaint and
other papers and records in this cause, including
this notice of motions and points and authorities
in support thereof, defendants Walston & Co., a
copartnership, and Charles de Y. Elkus, William
S. Hoelscher, Clifford P. Hoffman, C. J. Smith,

Vernon C. Walston and Claire Giannini Hoffman, transacting business as copartners [81] under the firm name and style of Walston & Co. will move the above Court (Honorable Harry A. Hollzer, District Judge) at Courtroom No. 2, Post Office and Federal Courts Building, City of Los Angeles, California, on the 21st day of May, 1942, at ten o'clock A. M. of that day, or as soon thereafter as counsel can be heard, as follows:

I.

For an order requiring plaintiff to state in a separate count the alleged claim founded upon the separate transaction referred to in Paragraphs XXXI to XXXIV, inclusive, of the first amended complaint herein, in which paragraphs it is alleged in substance that defendants Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman, together with Virgil D. Gianinni caused to be organized and created the copartnership of Walston & Co., and that thereafter defendants Amadeo P. Giannini and L. M. Giannini caused defendant Transamerica Corporation to divert its security brokerage business to said copartnership and unnecessarily to pay to said copartnership the sum of approximately Five Hundred Thousand Dollars (\$500,000.00) as brokerage fees and for use as capital, which money from time to time was divided and disbursed by said copartnership to said defendants Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman and to said Virgil D. Giannini.

This motion is made upon the ground that the first amended complaint herein unites and does not

state in separate counts several claims founded upon separate transactions or occurrences, of which the separate transaction above referred to is one, and the only one in which the moving defendants are in anywise interested or concerned, in violation of the provisions of Rule 10 (b) of the Federal Rules of Civil Procedure; that the defendants involved in the separate transaction above referred to [82] are not the same as the defendants involved in the other separate transactions or occurrences referred to in said first amended complaint; that the plaintiff's alleged right to recover from these moving defendants is based upon theories separate and different from those upon which plaintiff claims the right to recover from the other defendants herein; that a statement in a separate count of the separate transaction above referred to will facilitate the clear presentation of the matters pertinent thereto, as well as the presentation of the general and special defenses of these moving defendants.

II.

To dismiss the above action on the following grounds, to-wit:

(a) That said first amended complaint fails to state a claim upon which relief can be granted;

(b) That the alleged claim against these moving defendants is barred by the provisions of Section 338, Subdivision (4) and Section 339 of the Code of Civil Procedure of the State of California;

(c) That these moving defendants are improperly joined as defendants.

III.

In the alternative and without prejudice to the foregoing motion to dismiss, for an order severing the alleged cause of action referred to in Paragraph I hereinabove and ordering that said cause of action be separately tried.

IV.

For an order requiring plaintiff to make a more definite statement of or a bill of particulars in respect to, the following matters, as to each of which these moving defendants desire more definite particulars and in respect to each of which the first amended complaint is defective.

1. What is the number of shares of capital stock of [83] defendant Transamerica Corporation of which plaintiff is the holder, as alleged in Paragraph III, (p. 3, lines 17-21), and what was the total number of issued and outstanding shares of capital stock of Transamerica Corporation on the date of the commencement of this action.

2. What was the extent of the ownership of stock of defendant Transamerica Corporation of defendants Amadeo P. Giannini and L. M. Giannini, and John M. Grant, deceased, as alleged in paragraph XXI (p. 9, lines 18-20), and what were the periods of time during which such shares were held.

3. What was the extent and number of shares of stock of defendant Transamerica Corporation as to which defendants Amadeo P. Giannini and L. M. Giannini held proxies, as alleged in paragraph XXI (p. 9, lines 18-20), and what were the periods of

time during which such proxies were held.

4. What were the "various means and devices" by which it is alleged in Paragraph XXI (p. 9, lines 18-25) defendant Amadeo P. Giannini and other selected and named the officers and members of the Board of Directors of defendant Transamerica Corporation and controlled and dominated and determined its entire business policies and affairs.

5. Whether the members of the Board of Directors of defendant Transamerica, alleged in Paragraph XXI, (p. 9, line 18 to p. 10, line 8) to have been controlled and dominated and not to have exercised any independent judgment in the performance of their duties, at all times constituted a majority of the members of said Board of Directors, and if not at all times, then at what times.

6. Wherein and in what manner and by reason of what facts did each director of Bancitaly Corporation, other than defendant Amadeo P. Giannini, become and remain the dummy agent and alter ego of said defendant, as alleged in Paragraph XXIII (p. 11, lines 7-8). [84]

7. What were the dates in 1932, 1933, 1934, 1935, 1936, 1937, and 1938, upon which Transamerica paid brokerage fees to defendant Walston & Co., as alleged in Paragraph XXXIII (p. 18, lines 24-32), and what was the amount of each payment.

8. What was the date and amount of each sum of money paid by Transamerica Corporation to Walston & Co. for use as capital and for other

purposes, as alleged in said Paragraph XXXIII (p. 19, lines 1-2).

9. How and in what manner were defendants Amadeo P. Giannini or his testator Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its share holders, as alleged in Paragraph XXXIII (p. 19, lines 14-21).

10. In what manner and to what extent and by reason of what facts did said other individual members of Walston & Co. become the secret trustees, agents and representatives of defendants Amadeo P. Giannini. L. M. Giannini, Claire Giannini Hoffman and Virgil D. Giannini as alleged in Paragraph XXXI (p. 17, lines 21-30).

11. Were the brokerage fees allegedly paid to Walston & Co. as alleged in Paragraph XXXIII (p. 18, lines 24-32) the same as or more or less than the fees usually and regularly payable to brokers in transactions of the nature involved.

V.

For an order striking the following matters from the first amended complaint:

1. The language appearing in Paragraph XXXI thereof at page 18, lines 4 and 5, reading as follows: "and as such constituted and was the alter ego of each of said defendants."

2. The language appearing in Paragraph XXXIII thereof at page 19, lines 8 and 9 thereof as follows: "as the alter ego and dummy agent of and"

3. Each and every allegation contained in Paragraphs IV, XI, XIII, XIV, XX to XXX, both inclusive, and XXXV to XLI, both inclusive.

Said motion to strike will be made upon the ground that the matters above specified are redundant, immaterial and impertinent.

Insofar as the foregoing motion for a more definite statement or bill of particulars pertains to allegations specified in the foregoing motion to strike, the former motion shall be deemed as an alternative to the latter.

BACIGALUPI, ELKUS & SALLINGER

CLAUDE N. ROSENBERG, Esq.

By CLAUDE N. ROSENBERG

Attorneys for Defendants
Walston & Co., a copartnership, and Charles de Y. Elkus, William S. Hoelscher, Clifford P. Hoffman, C. J. Smith, Vernon C. Walston and Claire Giannini Hoffman, transacting business as copartners under the firm name and style of Walston & Co.

The address of said attorneys is:

300 Montgomery Street
San Francisco, California [86]

Receipt of a copy of the within is hereby admitted this 4th day of May, 1942.

VINCENT A. MARCO,
PERCY V. CLIBBORN,
HOMER N. BOARDMAN,
JOSEPH A. RUSKAY,
By PERCY V. CLIBBORN,
Attorneys for Plaintiff

[Endorsed]: Filed May 4, 1942. [87]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANTS L. M. GIANNINI, INDIVIDUALLY, AND AS AN ALLEGED PARTNER OF WALSTON & CO., O. D. HAMLIN, T. W. HARRIS, A. P. JACOBS, F. G. STEVENOT, P. A. BRICCA, GEORGE J. De MARTINI, W. N. LAGOMARSINO, CHESTER H. LOVELAND, THEODORE M. STUART, A. J. SCAMPINI, GORDON GRAY and RUSS AVERY,

- (1) TO DISMISS THE ACTION;
- (2) FOR AN ORDER REQUIRING PLAINTIFF SEPARATELY TO STATE CAUSES OF ACTION IN SEPARATE COUNTS;
- (3) FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS; AND
- (4) TO STRIKE.

Defendants L. M. Giannini, Individually, and as an Alleged Partner of Walston & Co., O. D. Ham-

lin, T. W. Harris, A. P. Jacobs, F. G. Stevenot, P. A. Bricca, George J. De Martini, W. N. Lagomarsino, Chester H. Loveland, Theodore M. Stuart, A. J. Scampini, Gordon Gray and Russ Avery do, and each of them does move the Court as follows: [88]

I.

MOTION TO DISMISS

To dismiss the action because the First Amended Complaint fails to state a claim against said defendants, or any of them.

II.

MOTION FOR SEPARATE STATEMENT

For an order requiring plaintiff to state in separate counts the claims founded upon the following separate transactions:

First. The transaction, the gist of which appears in paragraphs XXII to XXX, inclusive, and in which it is alleged that defendant Amadeo P. Giannini, individually, received from defendant Transamerica Corporation and its predecessor, Bancitaly Corporation, the sum of approximately \$5,000,000.00 under a salary agreement between defendant Amadeo P. Giannini and Bancitaly Corporation and assumed by defendant Transamerica Corporation, that said salary agreement was ultra vires as to Bancitaly Corporation, that it was made and assumed by the respective Boards of Directors acting under the domination of defendant Amadeo P. Gian-

nini, that the payments made were computed upon false and fictitious profits, and that no consideration was given by defendant Amadeo P. Giannini.

Second. The transaction, the gist of which appears in paragraphs XXXI to XXXIV, inclusive, and in which it is alleged that defendant Amadeo P. Giannini and another caused defendant Transamerica Corporation unnecessarily to pay to defendant Walston & Co., a co-partnership, the sum of approximately \$500,000.00 as brokerage fees and for use as capital, which money was paid and distributed by said co-partnership to the alleged partners thereof, including defendant, Amadeo P. Giannini and said Virgil D. Giannini, deceased.

Third. The transaction, the gist of which appears in paragraphs XXXV to XLIII, inclusive, and in respect to which it is [89] alleged that defendants Amadeo P. Giannini, L. M. Giannini and said Virgil D. Giannini, deceased, and others received substantial sums as profits from speculations carried on through Bankitaly Mortgage Company, later Pacific Coast Mortgage Company, and a trust syndicate described as the "Mallory-Smith Trust Syndicate" in the aiding and abetting of which Associated American Distributors, Inc. incurred losses of approximately \$2,250,000.00, which losses defendant Amadeo P. Giannini and another caused defendant Transamerica Corporation to reimburse said Associated American Distributors, Inc.

This motion is made upon the ground that the First Amended Complaint unites and does not state in separate counts the several claims founded upon separate transactions or occurrences, in violation

of the provisions of paragraph (b) of Rule 10 of the Federal Rules of Civil Procedure; that the defendants involved in said first transaction are not the same as the defendants involved in said second transaction or in said third transaction; that the defendants involved in said third transaction are not the same as the defendants involved in said second transaction; that plaintiff's alleged right to recover in behalf of Transamerica is based upon separate and different theories upon each of said three transactions; that a statement in separate counts of said three transactions will facilitate the clear presentation of the matters set forth, and that such a separate statement will facilitate the presentation of the special defenses thereto of defendants L. M. Giannini, O. D. Hamlin, T. W. Harris, A. P. Jacobs, F. G. Stevenot, P. A. Bricca, George J. De Martini, W. N. Lagomarsino, Chester H. Loveland, Theodore M. Stuart, A. J. Scampini, Gordon Gray and Russ Avery

III.

MOTION FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

For an order requiring plaintiff to make a more definite [90] statement of, or a bill of particulars in respect to, the following matters, as to each of which these defendants desire more definite particulars and in respect to each of which the first amended complaint is defective. Items 7, 8, 9 and 10 hereinafter set forth, as noted therein, involve

allegations which defendants seek to have stricken in their Motion to Strike (post). In respect to Items 7, 8, 9 and 10, this motion is made in the alternative and without prejudice to the Motion to Strike.

1. What is the number of shares of capital stock of defendant Transamerica Corporation of which plaintiff is the holder, as alleged in paragraph III (p. 3, lines 17-21), and what was the total number of issued and outstanding shares of capital stock of Transamerica Corporation on the date of the commencement of this action.

2. Whether plaintiff has been a shareholder of Transamerica only since on or about March 7, 1929, as alleged in paragraph III (p. 3, lines 17-21), or whether, as alleged in paragraph XIX (p. 6, lines 25-27), she was a shareholder of said defendant at the time of each and all of the transactions of which she complains, that is to say, including the matters complained of in paragraphs XXII to XXIX, inclusive (p. 10, line 10 to p. 16, line 19), some of which are there alleged to have occurred at dates prior to October 11, 1928, the date upon which Transamerica Corporation was organized, as alleged in paragraph I (p. 2, line 21) and before March 7, 1929.

3. What was the extent of the ownership of stock of defendant Transamerica Corporation of defendants Amadeo P. Giannini and L. M. Giannini, and John M. Grant, deceased, as alleged in paragraph XXI (p. 9, lines 18-20), and what were the periods of time during which such shares were held. [91]

4. What was the extent and number of shares of stock of defendant Transamerica Corporation as to which defendants Amadeo P. Giannini and L. M. Giannini held proxies, as alleged in paragraph XXI (p. 9, lines 18-20), and what were the periods of time during which such proxies were held.

5. What were the "various means and devices" by which it is alleged in paragraph XXI (p. 9, lines 18-25) defendant Amadeo P. Giannini and others selected and named the officers and members of the Board of Directors of defendant Transamerica Corporation and controlled and dominated and determined its entire business policies and affairs.

6. Whether the members of the Board of Directors of defendant Transamerica, alleged in paragraph XXI (p. 9, line 18 to p. 10, line 8) to have been controlled and dominated and not to have exercised any independent judgment in the performance of their duties, at all times constituted a majority of the members of said Board of Directors, and if not at all times, then at what times.

7. (As an alternative to the Motion to Strike (post, Item 1) Wherein and in what manner and by reason of what facts did each director of Bancitaly Corporation, other than defendant Amadeo P. Giannini, become and remain the dummy agent and alter ego of said defendant, as alleged in paragraph XXIII (p. 11, lines 7-8).

8. (As an alternative to the Motion to Strike (post, Item 2) Wherein and in what manner was the salary agreement beyond the scope of the corporate powers of Bancitaly Corporation and in

excess of the authority of its officials and Board of Directors, as alleged in paragraph XXIV (p. 11, lines 23-26).

9. (As an alternative to the Motion to Strike (post, Item 3) To what extent were the credit items referred to in paragraph XXV (p. 12, lines 3-18) in excess of five per cent of the [92] actual and true net profits of Bancitaly Corporation, as also alleged in said paragraph (p. 12, lines 19-28).

10. (As an alternative to the Motion to Strike (post, Item 3) Of what did the false, fictitious, inflated and untrue book profits, alleged in paragraph XXV (p. 12, lines 28 and 29), consist, and what was the extent thereof, and what is meant by the words "book profits."

11. Which of the entries alleged in paragraph XXVII (p. 13, lines 25-26) were made prior to March 7, 1929, the date upon which plaintiff became a stockholder of defendant Transamerica Corporation, what was the period of time to which the entries related, and what was the date and amount of each of such entries.

12. What were the dates and amounts of the several items and entries made in the corporate records and books of defendant Transamerica Corporation, as alleged in paragraph XXVII (p. 14, lines 3-12), and of the net profits of what period of time did such entries purport to be five per cent.

13. To what extent were the credit items, referred to in paragraph XXVII (p. 14, lines 3-12), in excess of five per cent of the actual and true net

profits of Transamerica Corporation, as also alleged in paragraph XXVII (p. 14, lines 18-21).

14. Of what did the false, fictitious, inflated and untrue book profits alleged in paragraph XXVII (p. 14, lines 22-23) consist, and what was the extent thereof, and what is meant by the words "book profits", and were such fees the regular and usual fees.

15. Whether, as alleged in paragraph XXVIII (p. 15, lines 2-14), sums purportedly payable to defendant Amadeo P. Giannini under said salary agreement "were by him unearned, and for which he gave no consideration" (p. 15, lines 11-12), or whether, as alleged in paragraph XXI (p. 9, lines 18-25), during all of the times covered by said salary agreement since the incorporation of Transamerica Corporation defendant Amadeo P. Giannini controlled and determined its entire business policies and affairs. [93]

16. How and in what manner did the credits referred to in paragraph XXVIII (p. 15, lines 2-14) constitute unauthorized and illegal corporate liabilities of Transamerica Corporation as in said paragraph alleged.

17. What were the date or dates and the amount or amounts in which payments were made to defendant Amadeo P. Giannini during the years 1927 to 1931, inclusive, as alleged in paragraph XXIX (p. 15, lines 16-24); which of said payments were made before October 11, 1928, the date upon which defendant Transamerica Corporation was organized (p. 2, line 21), and which were made before march

7, 1929, the date upon which plaintiff became a shareholder of defendant Transamerica Corporation, as alleged in paragraph III (p. 2, line 18).

18. What were the false, misleading and untrue names and designations under which payments and disbursements to defendant Amadeo P. Giannini are alleged in paragraph XXX (p. 17, lines 4-10) to have been covered, disguised and concealed.

19. What were the dates in 1932, 1933, 1934, 1935, 1936, 1937, and 1938, upon which Transamerica paid brokerage fees to defendant Walston & Co., as alleged in paragraph XXXIII (p. 18, lines 24-32), and what was the amount of each payment.

20. What was the date and amount of each sum of money paid by Transamerica Corporation to Walston & Co. for use as capital and for other purposes, as alleged in said paragraph XXXIII (p. 19, lines 1-2).

21. How and in what manner were defendants Amadeo P. Giannini or his testator Virgil D. Giannini, now deceased, or L. M. Giannini, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XXXIII (p. 19, lines 14-21).

22. What was the private and confidential knowledge and information, acquired by defendants Amadeo P. Giannini and [94] L. M. Giannini in their capacity as officers and directors of defendant Transamerica Corporation and used for speculative operations, as alleged in paragraph XXXVII (p. 22, lines 2-8).

23. What means and methods were used to accomplish the payments and advances from Transamerica Corporation to Bankitaly Mortgage Company, as alleged in paragraph XXXVIII (p. 22, line 10 to p. 23, line 2).

24. How and in what manner were Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XXXIX (p. 24, lines 17-20).

25. How and in what manner were Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XLI (p. 26, lines 14-18).

26. Who is Associated American Distributors, Inc. mentioned in paragraph XLII (p. 26, line 28; p. 27, lines 2, 20-21 and 24) and paragraph XLIII (p. 28, lines 5-6), and what was its relationship, if any, to defendant Transamerica Corporation.

27. What were the dates and amounts of the losses of Associated Distributors, Inc., alleged in paragraph XLII (p. 27, lines 2-3).

28. What were the dates and amounts of the payments by defendant Transamerica Corporation to Associated American Distributors, Inc., alleged in paragraph XLII (p. 27, lines 7-8).

29. What were the false, fictitious and misleading

entries and records by which the transfer and use of funds of Transamerica Corporation were disguised, covered and concealed, as alleged in paragraph XLIII (p. 28, lines 17-18). [95]

30. What loss, if any, did Transamerica suffer by paying brokerage fees to Walston & Co., as alleged in paragraph XXXIII (p. 18, lines 24-32).

31. What brokerage business was diverted to Walston & Co., which belonged to Transamerica, as alleged in paragraph XXXIII (p. 18, lines 24-32).

32. In behalf of defendants Scampini and Avery, whose terms of office are alleged to have expired in 1938 (Paragraph XX, Page 7, lines 16½ and 21), what part of the \$34,000.00 payment, if any, alleged in Paragraph XXIX to have been made to Amadeo P. Giannini, was made before their terms of office expired, (Paragraph XXIX, page 16, line 7).

The foregoing motion will be made upon the ground that the First Amended Complaint lacks definiteness in the particulars specified and is defective in that regard, and that the details desired by these defendants are necessary to enable them properly to prepare their responsive pleadings and to prepare for trial.

IV.

MOTION TO STRIKE

For an order striking the following matters from the First Amended Complaint:

1. The language appearing in paragraph XXIII of said complaint, at page 11, lines 5 to 11, inclusive, reading as follows:

“and the remaining members of the Board of Directors and other officials of said corporation were, and each of them was, at all such times a dummy agent and alter ego of said defendant Amadeo P. Giannini, and as such controlled and dominated by him for the purpose of enhancing his own personal and individual interests to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned.” [96]

2. The language appearing in paragraph XXIV of said complaint, at page 11, line 23 to page 12, line 1, reading as follows:

“Plaintiff alleges that the execution and making of said salary agreement was beyond the scope of the corporate powers of said Bancitaly Corporation, and in excess of the authority of its officials and Board of Directors, and was caused to be made by said Amadeo P. Giannini, and knowingly permitted by the remaining members of the Board of Directors and other officials of said Bancitaly Corporation, each and all of whom intended thereby to enhance the personal and individual interests of and unjustly enrich the said defendant Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned.”

3. The language appearing in paragraph XXV of said complaint, at page 12, line 19 to page 13, line 5, reading as follows:

“Plaintiff further alleges with respect to the said entries and records, aforesaid, that the total credit and each item thereof so entered and recorded upon the corporate records and books of account of said Bancitaly Corporation in favor of said defendant, Amadeo P. Giannini, was and is false and untrue, in that the same does not truly and correctly represent five per cent (5%) of the actual and true net profits of said corporation for said period or any part thereof, but on the other hand was and is in excess thereof, and by said defendant and said directors and officers knowingly computed upon false, fictitious, inflated and untrue book profits, the precise extent thereof being to plaintiff unknown, and all of which [97] was so caused to be done by said defendant, Amadeo P. Giannini, and knowingly permitted by the remaining members of the Board of Directors and other officials of said Bancitaly Corporation, with the intent of each of them to thereby enhance the personal and individual interests of and unjustly enrich the said defendant, Amadeo P. Giannini, to the detriment of said corporation and its shareholders in the particulars hereinafter mentioned.”

4. All the allegations set forth in paragraphs XXII, XXIII, XXIV, XXV, XXVI, XXVII and XXVIII, and each of them, which refer

to the organization and operation of Bancitaly Corporation and its entering into transactions with Amadeo P. Giannini prior to the time that these defendants are alleged in paragraph XX to have become directors in Transamerica. (Page 6 lines 29-32; page 7 lines 8, 9, 12 to 21, inclusive.)

Said motion will be made upon the ground that the matters above specified are redundant, immaterial and impertinent.

RUSS AVERY and
GORDON GRAY

By RUSS AVERY

Attorneys for said defendants
L. M. Giannini, individually,
and as an alleged partner of
Walston & Co., O. D. Ham-
lin, T. W. Harris, A. P.
Jacobs, F. G. Stevenot, P.
A. Bricca, George J. De
Martini, W. N. Lagomar-
sino, Chester H. Loveland,
Theodore M. Stuart, A. J.
Scampini, Gordon Gray and
Russ Avery.

RUSS AVERY

In Pro Per

604 Homer Laughlin Build-
ing
315 South Broadway
Los Angeles, California

GORDON GRAY

In Pro Per

Bank of America Building,
San Diego, California.

By RUSS AVERY [98]

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq.,
Homer N. Boardman, Esq., and Joseph A. Rus-
kay, Esq., Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before this Court (Honorable Harry A. Hollzer, District Judge) at Court Room No. 2, Post Office and Federal Courts Building, City of Los Angeles, California, on the 21st day of May, 1942, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

You Will Further Take Notice that all of said motions will be made upon the files and records herein, including the First Amended Complaint, said motions and this notice

Please Take Further Notice that these defendants will rely upon points and authorities in support of

said motions, a copy of which is herewith served upon you.

RUSS AVERY and
GORDON GRAY

By RUSS AVERY

Attorneys for said defendants
L. M. Giannini, individually,
and as an alleged partner of
Walston & Co., O. D. Ham-
lin, T. W. Harris, A. P.
Jacobs, F. G. Stevenot, P.
A. Bricca, George J. De
Martini, W. N. Lagomar-
sino, Chester H. Loveland,
Theodore M. Stuart, A. J.
Scampini, Gordon Gray and
Russ Avery.

RUSS AVERY

In Pro Per

604 Homer Laughlin Build-
ing,

315 South Broadway

Los Angeles, California.

GORDON GRAY

In Pro Per

Bank of America Building

San Diego, California.

By RUSS AVERY [99]

Received copy of the within motions this 4th day of May, 1942.

VINCENT ANTHONY MARCO,
PERCY V. CLIBBORN,
HOMER N. BOARDMAN and
JOSEPH A. RUSKAY

By PERCY V. CLIBBORN

Attorneys for Plaintiff.

[Endorsed]: Filed May 4, 1942 [100]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANTS A. H. GIANNINI,
WILLIAM E. BLAUER, LEON BOC-
QUERAZ, E. H. CLARK, CHARLES N.
HAWKINS, W. F. MORRISH (SUED
HEREIN AS W. F. MORRISON), A. J.
MOUNT, ALFRED E. SBARBORO (SUED
AS ALFRED E. SPARBORO), JAMES A.
BACIGALUPI, GEORGE A. WEBSTER, C.
R. BELL, W. W. GARTHWAITE AND
LOUIS FERRARI, JOINTLY AND SEV-
ERALLY:

- (1) TO DISMISS THE ACTION;
- (2) FOR AN ORDER REQUIRING PLAIN-
TIF TO STATE SEPARATELY CAUSES
OF ACTION IN SEPARATE COUNTS;
- (3) FOR A MORE DEFINITE STATEMENT
OR BILL OF PARTICULARS; AND

(4) TO STRIKE OUT PORTIONS OF THE COMPLAINT.

Defendants A. H. Giannini, William E. Blauer, Leon Bocqueraz, E. H. Clark, Charles N. Hawkins, W. F. Morrish (sued [101] herein as W. F. Morrison), A. J. Mount, Alfred E. Sbarboro (sued herein as Alfred E. Sparboro), James A. Bacigalupi, George A. Webster, C. R. Bell, W. W. Garthwaite and Louis Ferrari, jointly, and each severally, move the Court as follows:

MOTION TO DISMISS

I. To dismiss the above entitled action,

(a) because the First Amended Complaint fails to state a claim against said defendants jointly, or against any one or more of them jointly with others, or against any of said defendants severally, upon which relief can be granted;

(b) because the alleged claim against these defendants jointly, and severally as to each, is barred by the provisions of Section 338, subdivision 4, Section 339, subdivision 1, and Section 343, of the Code of Civil Procedure of the State of California.

MOTION FOR SEPARATE STATEMENT

II. For an order requiring the plaintiff to state in separate counts the claims founded upon the following separate transactions:

First: The transaction the gist of which appears in paragraphs XXII to XXV, inclusive, and in which it is alleged that on the 13th day of April,

1927, the said Bancitaly Corporation, acting through its Board of Directors, entered into a written agreement with Amadeo P. Giannini providing that, for his personal services rendered as President of said corporation, he should receive and be paid five per cent of the net profits of the said corporation per annum, with a guaranteed minimum of \$100,000.00 per annum, commencing on January 1, 1927, in lieu of salary; that said agreement was beyond the scope of the corporate powers of Bancitaly Corporation, and in excess of the authority of its Board of Directors, and was made to unjustly enrich the defendant Amadeo [102] P. Giannini, to the detriment of the stockholders of Bancitaly Corporation; that pursuant to said agreement, defendant Amadeo P. Giannini caused, and the directors and officials of Bancitaly Corporation permitted, certain entries and records to be made in the books of Bancitaly Corporation which reflected a credit in favor of said Amadeo P. Giannini in the sum of \$925,000.00, and that the books of account of said Bancitaly Corporation were likewise untrue, in that the amounts credited to Amadeo P. Giannini did not correctly represent five per cent of the actual net profits of the corporation for the period in question, but that the amount was in excess thereof, and was improperly computed upon untrue book profits, to the detriment of said Bancitaly Corporation.

Second: The transaction the gist of which appears in paragraphs XVII to XXX, inclusive, and in which it is alleged that Amadeo P. Giannini caused his co-defendant directors and officers of

Transamerica Corporation, on the 27th day of December, 1928, to acquire the assets of Bancitaly Corporation, and to assume the salary agreement and the credit entries with regard thereto, and that from the first day of January, 1927 to about the first day of January, 1930, Amadeo P. Giannini and the officers and directors of Transamerica Corporation permitted entries in the books of the corporation in favor of Amadeo P. Giannini in substantial sums not less than \$5,000,000.00; that the said entries were not true or correct, as the said sum does not truly and correctly represent five per cent of the actual and true net profits of Transamerica Corporation for said period, or any part thereof; that said entries were made and credits given to enrich the defendant Amadeo P. Giannini, and to the detriment of Transamerica Corporation, and that no consideration was given by defendant A. P. Giannini for the said credits; that said Transamerica Corporation, between the first day of January, 1927 [103] and the first day of January, 1939, paid to Amadeo P. Giannini sums of money on account of said wrongful credits, aggregating not less than \$5,000,000.00; that the assets and liabilities of Transamerica Corporation were reflected on the books by an intricate system of accounting, and that by reason thereof the said expenditures were disguised and concealed.

Third: The transaction the gist of which appears in paragraphs XXXI to XXXIV, inclusive, and in which it is alleged that on or about the 17th day of December, 1932, Amadeo P. Giannini and others

caused the organization of the firm of Walston & Co., and that during the years from 1932 to 1938, inclusive, the officers and directors of Transamerica Corporation caused Transamerica Corporation to unnecessarily pay to Walston & Co. large and substantial sums of money as brokerage fees and other sums for use as capital, totaling approximately \$500,000.00, to the detriment of said Transamerica Corporation and the unjust enrichment of Walston & Co. and its partners.

Fourth: The transaction the gist of which appears in paragraphs XXXV to XLIII, inclusive, in respect to which it is alleged that during the years 1932 to 1936, inclusive, Amadeo P. Giannini and others received substantial sums in profits from speculations in Transamerica stock, carried on through Bankitaly Mortgage Company, later Pacific Coast Mortgage Company, and the Mallory-Smith trust syndicate; that Associated American Distributors aided and abetted the said transactions, and incurred losses in so doing in approximately the sum of \$2,250,000.00, which Amadeo P. Giannini and the officers and directors of Transamerica during said period, caused defendant Transamerica to reimburse to said Associated American Distributors.

This motion is made upon the ground that the First Amended Complaint unites and does not state in separate counts the [104] several claims founded upon separate alleged transactions or occurrences, in violation of the provisions of paragraph (b) of Rule 10 of the Federal Rules of Civil Procedure; that the defendants involved in said first alleged

transaction are not the same as the defendants involved in the second alleged transaction, or in the third and fourth alleged transactions; that the defendants involved in the second alleged transaction are not the same as those involved in the first, third and fourth alleged transactions; and the defendants involved in the third alleged transaction are different from the defendants involved in the first, second and fourth alleged transactions; and that the defendants involved in the fourth alleged transaction are different from those involved in the first, second and third alleged transactions; that the plaintiff's alleged right to recover in behalf of Transamerica is based upon separate and different theories respecting each of said four alleged transactions; that the aforesaid four transactions are alleged to have occurred during different times, and that the officers and directors of Transamerica, during the respective transactions, were different; that a statement in separate counts of said four transactions will facilitate the clear presentation of the special defenses thereto of the defendants herein named, both severally and jointly, and particularly the defense of the defendants joining in this motion that they were neither directors nor officers during the times of the occurrence of any of said alleged transactions.

MOTION FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

III. For an order requiring plaintiff to make a more definite statement of, or a bill of particulars

in respect to, the following matters, as to each of which defendants desire more definite particulars, and with respect to each of which the [105] Amended Complaint is defective:

1. What is the number of shares of capital stock of defendant Transamerica Corporation of which plaintiff is the holder, as alleged in paragraph III (p. 3, lines 17-21), and what was the total number of issued and outstanding shares of capital stock of Transamerica Corporation on the date of the commencement of this action?

2. Whether plaintiff has been a shareholder of Transamerica only since on or about March 7, 1929, as alleged in paragraph III (p. 3, lines 17-21), or whether, as alleged in paragraph XIX (p. 6, lines 25-27), she was a shareholder of said defendant at the time of each and all the transactions of which she complains, that is to say, including the matters complained of in paragraphs XXII to XXIX, inclusive (p. 10, line 10, to p. 16, line 19), many of which are there alleged to have occurred at dates prior to October 11, 1928, the date upon which Transamerica was organized, as alleged in paragraph I (p. 2, line 21), and before March 7, 1929.

3. What was the extent of the ownership of stock of defendant Transamerica Corporation and of defendants Amadeo P. Giannini, L. M. Giannini and John M. Grant, deceased, as alleged in paragraph XXI (p. 9, lines 18-20), and what were the periods of time during which such shares were held?

4. What was the extent and number of shares of stock of defendant Transamerica Corporation

as to which defendants Amadeo P. Giannini and L. M. Giannini held proxies, as alleged in paragraph XXI (p. 9, lines 18-20), and what were the periods of time during which such proxies were held?

5. What were the "various means and devices" by which it is alleged in paragraph XXI (p. 9, lines 18-25) defendant A. P. Giannini and others selected and named the officers and directors [106] of defendant Transamerica Corporation, and controlled and dominated its entire business policies and affairs.

6. Whether the members of the Board of Directors of defendant Transamerica, alleged in paragraph XXI (p. 9, line 18, to p. 10, line 8) to have been controlled and dominated and not to have exercised any independent judgment in the performance of their duties, at all times constituted a majority of the members of said Board of Directors, and if not at all times, then at what times?

7. Whether the defendants joining in this motion, or either or any of them, were directors of Bancitaly Corporation, and, if so, the date when each of them became such director, and the date when his term of office ceased.

8. Wherein and in what manner was the salary agreement beyond the scope of the powers of Bancitaly Corporation and in excess of the authority of its officials and Board of Directors, as alleged in paragraph XXIV (p. 11, lines 23-26)?

9. To what extent were the credit items referred to in paragraph XXV (p. 12, lines 3 to 18) in excess

of the actual and true net profits of Bancitaly Corporation, as also alleged in paragraph XXV (p. 12, lines 19 to 28, inclusive).

10. Of what did the false, fictitious, inflated and untrue book profits, alleged in paragraph XXV (p. 12, lines 28-29) consist. What was the extent thereof; and what is meant by the words "book profits?"

11. What were the dates and amounts of the several items and entries made in the corporate records and books of defendant Transamerica Corporation, as alleged in paragraph XXVII (p. 14, lines 3-12), and of the net profits of what period of time did such entries purport to be five per cent?

12. To what extent were the credit items referred to in [107] paragraph XXVII (p. 14, lines 3-12), in excess of five per cent of the actual and true net profits of Transamerica Corporation, as alleged in said paragraph XXVII (p. 14, lines 18-21)?

13. Whether, as alleged in paragraph XXVIII (p. 15, lines 2-14) sums purportedly payable to defendant Amadeo P. Giannini under said salary agreement were by him unearned and without consideration (p. 15, lines 11-12), or whether, as alleged in paragraph XXI (p. 9, lines 18-25), during all of the times covered by said salary agreement since the incorporation of Transamerica Corporation, defendant Amadeo P. Giannini controlled and determined its entire business, policies and affairs.

14. How, and in what manner, did the credits

referred to in paragraph XXVIII (p. 15, lines 2-14) constitute unauthorized and illegal corporate liabilities of Transamerica Corporation as in said paragraph alleged.

15. What was the date or dates, and the amount or amounts in which payments were made to defendant Amadeo P. Giannini during the years 1927 to 1939, inclusive, as alleged in paragraph XXIX (p. 15, lines 16-24), and particularly the time and amount of such payments made during the period that it is alleged the defendants joining in this motion were directors or officers of Transamerica Corporation.

16. What were the false, misleading and untrue names and designations under which payments and disbursements to defendant Amadeo P. Giannini are alleged in paragraph XXX (p. 17, lines 4-10) to have been "covered, disguised and concealed?"

17. What acts alleged in the complaint were committed by the defendants joining in this motion, and the time, facts and circumstances connected therewith?

In respect to this motion and the specifications therein contained, this motion is made in the alternative, and without [108] prejudice to the Motion to Strike, based in whole or in part on the same grounds.

The foregoing motion will be made upon the ground that the First Amended Complaint lacks definiteness in the particulars specified, and is defective in that regard, and that the details desired by the defendants joining in this motion, and each

of them, are necessary to enable them and each of them to properly prepare their or his responsive pleading, and to prepare for trial.

MOTION TO STRIKE

IV. For an order striking the following matters from the First Amended Complaint:

1. All of paragraphs XXII to XXV, inclusive, in which is set forth an alleged cause of action with regard to transactions alleged to have been illegally entered into by officers and directors of Bancitaly Corporation, of which corporation none of the defendants joining in this motion are alleged in the complaint to have been either officers or directors.

2. All paragraphs XXXI to XXXIV, inclusive, in which is set forth a cause of action based upon transactions between Transamerica and Walston & Co., and which transactions are alleged to have taken place in 1933, after each of the defendants joining in this motion had ceased to be a director or officer of Transamerica Corporation.

3. All of paragraphs XXXV to XLIII, inclusive, with reference to dealings between Transamerica Corporation and the Smith-Mallory Trust Syndicate, Pacific Coast Mortgage Company and Associated American Distributors, all of which transactions are alleged in said complaint to have occurred subsequent to the time when each of the defendants joining in this motion had ceased to be an officer or director of Transamerica Corporation.

4. All of paragraphs XLIV and XLV. [109]

Said motion will be made upon the ground that

the matters above specified are, as to the defendants joining in this motion, redundant, immaterial and impertinent.

KEYES & ERSKINE

By HERBERT W. ERSKINE

HERBERT W. ERSKINE

LOUIS FERRARI

Attorneys for Defendants A.

H. Giannini, William E.

Blauer, Leon Bocqueraz, E.

H. Clark, Charles N. Hawk-

ins, W. F. Morrish, A. J.

Mount, Alfred E. Sbar-

boro, James A. Bacigalupi,

George A. Webster, C. R.

Bell, W. W. Garthwaite and

Louis Ferrari, jointly and

severally.

The address of said attorneys is:

625 Market St.,

San Francisco, California.

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq.,
Homer N. Boardman, Esq., and Joseph A. Rus-
kay, Esq., Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before this Court (Honorable Harry A. Hollzer, District Judge) at Court Room No. 2, Post Office and Federal Courts Building, City of Los Angeles, Cali-

fornia, on the 21st day of May, 1942, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

You Will Further Take Notice that all of said motions will be made upon the files and records herein, including the First Amended Complaint, said motions and this notice.

Please Take Further Notice that defendants A. H. Giannini, [110] William E. Blauer, Leon Bocqueraz, E. H. Clark, Charles N. Hawkins, W. F. Morrish, A. J. Mount, Alfred E. Sbarboro, James A. Bacigalupi, George A. Webster, C. R. Bell, W. W. Garthwaite and Louis Ferrari will, jointly and severally, rely upon points and authorities in support of said motions, a copy of which is herewith served upon you.

KEYES & ERSKINE

By HERBERT W. ERSKINE

HERBERT W. ERSKINE

LOUIS FERRARI

Attorneys for Defendants A.

H. Giannini, William E.

Blauer, Leon Bocqueraz, E.

H. Clark, Charles N. Hawk-

ins, W. F. Morrish, A. J.

Mount, Alfred E. Sbarboro,

James A. Bacigalupi,

George A. Webster, C. R.

Bell, W. W. Garthwaite and

Louis Ferrari, jointly and

severally.

Address: 625 Market St., San Francisco, California. [111]

Receipt of a copy of the within is hereby admitted
this 4th day of May, 1942.

VINCENT A. MARCO,
PERCY V. CLIBBORN,
HOMER N. BOARDMAN,
JOSEPH A. RUSKAY,
By PERCY V. CLIBBORN
Attorneys for Plaintiff

[Endorsed]: Filed May 4, 1942. [112]

[Title of District Court and Cause.]

MOTION OF DEFENDANT BANK OF AMER-
ICA NATIONAL TRUST & SAVINGS AS-
SOCIATION, AS ADMINISTRATOR-
WITH-THE-WILL-ANNEXED OF THE
ESTATE OF JOHN M. GRANT, DE-
CEASED,

- (1) TO DISMISS THE ACTION;
- (2) FOR A MORE DEFINITE STATEMENT
OR BILL OF PARTICULARS.

The defendant Bank of America National Trust
& Savings Association as Administrator-with-the-
Will-Annexed of the Estate of John M. Grant, de-
ceased, moves the court as follows:

MOTION TO DISMISS

I. To dismiss the action because the First Amended Complaint fails to state a claim against defendant upon which relief can be granted. [113]

MOTION FOR A MORE DEFINITE STATEMENT OF BILL OF PARTICULARS

II. For an order requiring plaintiff to make a more definite statement of, or a bill of particulars in respect to, the following matters, as to each of which defendant desires more definite particulars and in respect to each of which the First Amended Complaint is defective.

1. What is the number of shares of capital stock of defendant Transamerica Corporation of which plaintiff is the holder, as alleged in paragraph III (p. 3, lines 17-21), and what was the total number of issued and outstanding shares of capital stock of Transamerica Corporation on the date of the commencement of this action?

2. Whether plaintiff has been a shareholder of Transamerica only since on or about March 7, 1929, as alleged in paragraph III (p. 3, lines 17-21), or whether, as alleged in paragraph XIX (p. 6, lines 25-27), she was a shareholder of said defendant at the time of each and all of the transactions of which she complains, that is to say, including the matters complained of in paragraphs XXII to XXIX, inclusive (p. 10, line 10, to p. 16, line 19), some of which are there alleged to have occurred at dates prior to October 11, 1928, the date upon which Transamerica Corporation was organized, as alleged

in paragraph I (p. 2, line 21) and before March 7, 1929.

3. What was the extent of the ownership of stock of defendant Transamerica Corporation of defendants Amadeo P. Giannini and L. M. Giannini, and John M. Grant, deceased, as alleged in paragraph XXI (p. 9, lines 18-20), and what were the periods of time during which such shares were held.

4. What was the extent and number of shares of stock [114] of defendant Transamerica Corporation as to which defendants Amadeo P. Giannini and L. M. Giannini held proxies, as alleged in paragraph XXI (p. 9, lines 18-20), and what were the periods of time during which such proxies were held.

5. What were the "various means and devices" by which it is alleged in paragraph XXI (p. 9, lines 18-25), defendant Amadeo P. Giannini and others selected and named the officers and members of the Board of Directors of defendant Transamerica Corporation and controlled and dominated and determined its entire business policies and affairs.

6. Whether the members of the Board of Directors of defendant Transamerica, alleged in paragraph XXI (p. 9, line 18 to p. 10, line 8) to have been controlled and dominated and not to have exercised any independent judgment in the performance of their duties, at all times constituted a majority of the members of said Board of Directors, and if not at all times, then at what times.

7. Wherein and in what manner and by reason of what facts did each director of Bancitaly Cor-

poration, other than defendant Amadeo P. Giannini, become and remain the dummy agent and alter ego of said defendant, as alleged in paragraph XXIII (p. 11, lines 7-8).

8. Wherein and in what manner was the salary agreement beyond the scope of the corporate powers of Bancitaly Corporation and in excess of the authority of its officials and Board of Directors, as alleged in paragraph XXIV (p. 11, lines 23-26).

9. To what extent were the credit items referred to in paragraph XXV (p. 12, lines 3-18) in excess of five per cent of the actual and true net profits of Bancitaly Corporation, as also alleged in said paragraph (p. 12, lines 19-28).

10. Of what did the false, fictitious, inflated and untrue book profits, alleged in paragraph XXV (p. 12, lines 28-29), consist; what was the extent thereof; and what is meant by the words [115] "book profits".

11. Which of the entries alleged in paragraph XXVII (p. 13, lines 25-26) were made prior to March 7, 1929, the date upon which plaintiff became a stockholder of defendant Transamerica Corporation, what was the period of time to which the entries related, and what was the date and amount of each of such entries.

12. What were the dates and amounts of the several items and entries made in the corporate records and books of defendant Transamerica Corporation, as alleged in paragraph XXVII (p. 14, lines 3-12), and of the net profits of what period of time did such entries purport to be five per cent.

13. To what extent were the credit items, referred to in paragraph XXVII (p. 14, lines 3-12), in excess of five per cent of the actual and true net profits of Transamerica Corporation, as also alleged in paragraph XXVII (p. 14, lines 18-21).

14. Of what did the false, fictitious, inflated and untrue book profits alleged in paragraph XXVII (p. 14, lines 22-23) consist; what was the extent thereof; and what is meant by the words "book profits".

15. Whether, as alleged in paragraph XXVIII (p. 15, lines 2-14), sums purportedly payable to defendant Amadeo P. Giannini under said salary agreement "were by him unearned, and for which he gave no consideration" (p. 15, lines 11-12), or whether as alleged in paragraph XXI (p. 9, lines 18-25), during all of the times covered by said salary agreement since the incorporation of Transamerica Corporation defendant Amadeo P. Giannini controlled and determined its entire business policies and affairs.

16. How and in what manner did the credits referred to in paragraph XXVIII (p. 15, lines 2-14) constitute unauthorized and illegal corporate liabilities of Transamerica Corporation as in said paragraph alleged. [116]

17. What were the date or dates and the amount or amounts in which payments were made to defendant Amadeo P. Giannini during the years 1927 to 1931, inclusive, as alleged in paragraph XXIX (p. 15, lines 16-24); which of said payments were made before October 11, 1928, the date upon which de-

fendant Transamerica Corporation was organized (p. 2, line 21), and which were made before March 7, 1929, the date upon which plaintiff became a shareholder of defendant Transamerica Corporation, as alleged in paragraph III (p. 2, line 18).

18. What were the false, misleading and untrue names and designations under which payments and disbursements to defendant Amadeo P. Giannini are alleged in paragraph XXX (p. 17, lines 4-10) to have been covered, disguised and concealed.

19. What were the dates in 1932, 1933, 1934, 1935, 1936, 1937, and 1938, upon which Transamerica paid brokerage fees to defendant Walston & Co., as alleged in paragraph XXXIII (p. 18, lines 24-32); what was the amount of each payment; and were such fees the regular and usual fees.

20. What was the date and amount of each sum of money paid by Transamerica Corporation to Walston & Co. for use as capital and for other purposes, as alleged in said paragraph XXXIII (p. 19, lines 1-2).

21. How and in what manner were defendants Amadeo P. Giannini or his testator Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XXXIII (p. 19, lines 14-21).

22. What was the private and confidential knowledge and information, acquired by defendants Amadeo P. Giannini and L. M. Giannini in their capacity as officers and directors of defendant Transamerica

Corporation and used for speculative operations, as [117] alleged in paragraph XXXVII (p. 22, lines 2-8).

23. What means and methods were used to accomplish the payments and advances from Transamerica Corporation to Bankitaly Mortgage Company, as alleged in paragraph XXXVIII (p. 22, line 10, to p. 23, line 2).

24. How and in what manner were Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XXXIX (p. 24, lines 17-20).

25. How and in what manner were Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, now deceased, or any of them, unjustly enriched, and how was the alleged unjust enrichment to the detriment of Transamerica Corporation and its shareholders, as alleged in paragraph XLI (p. 26, lines 14-18).

26. Who is Associated American Distributors, Inc. mentioned in paragraph XLII (p. 26, line 28; p. 27, lines 2, 20-21 and 24) and paragraph XLIII (p. 28, lines 5-6), and what was its relationship, if any, to the defendant Transamerica Corporation.

27. What were the dates and amounts of the losses of Associated American Distributors, Inc., alleged in paragraph XLII (p. 27, lines 2-3).

28. What were the dates and amounts of the payments by defendant Transamerica Corporation

to Associated American Distributors, Inc., alleged in paragraph XLII (p. 27, lines 7-8).

29. What were the false, fictitious and misleading entries and records by which the transfer and use of funds of Transamerica Corporation were disguised, covered and concealed, as alleged in paragraph XLIII (p. 28, lines 17-18).

30. What other persons were directors of Transamerica Corporation and Bankitaly Corporation other than the persons named as [118] defendants, during the period from October 11, 1928, to January 1, 1939, and the dates of their respective incumbents as directors.

The foregoing motion will be made upon the ground that the First Amended Complaint lacks definiteness in the particulars specified and is defective in that regard, and that the details desired by defendant are necessary to enable it to properly prepare its responsive pleadings and to prepare for trial.

GEORGE D. SCHILLING

G. L. BERREY

Attorneys for defendant Bank
of America National Trust
& Savings Association as
Administrator - with - the -
Will-Annexed of the Estate
of John M. Grant, deceased.

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq.,
Homer N. Boardman, Esq., and Joseph A. Rus-
kay, Esq., Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before this Court (Honorable Harry A. Hollzer, District Judge) at Court Room No. 2, Post Office and Federal Courts Building, City of Los Angeles, California, on the 21st day of May, 1942, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

You Will Further Take Notice that both of said motions will be made upon the files and records herein, including the First Amended Complaint, said motions and this notice.

Please Take Further Notice that defendant Bank of America [119] National Trust & Savings Association, as Administrator-with-the-Will-Annexed of the Estate of John M. Grant, deceased, will rely upon points and authorities in support of said motions, a copy of which is herewith served upon you.

GEORGE D. SCHILLING

G. L. BERREY

Attorneys for defendant, Bank
of America, etc.

Address: 410 Bank of America Building,
Los Angeles, California.
TRinity 4353 [120]

Received Copy of the Within motion this 4th day of May, 1942.

VINCENT ANTHONY MARCO,
PERCY V. CLIBBORN,
HOMER W. BOARDMAN and
JOSEPH A. RUSKAY

By PERCY V. CLIBBORN

Attorney for Plaintiff.

[Endorsed]: Filed May 4, 1942. [121]

At a stated term to-wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 25th day of June, in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable: Harry A. Hollzer District Judge.

[Title of Cause.]

No. 1490-H Civil

HEARING ON MOTIONS TO DISMISS, ETC.

This cause coming on for further hearing on motions to dismiss, etc. of the following defendants: Amadeo P. Giannini, individually and as Executor of the Last Will and Testament of Virgil D. Giannini, deceased, for whom T. B. Cosgrove and John

N. Cramer, Esqs., are present as counsel; Herbert E. White for whom Robert A. Odell, Esq., is present as counsel; L. M. Giannini, individually, and as an alleged partner of Walston & Co., et al., for whom Russ Avery, Esq., is present as counsel; A. H. Giannini, et al., for whom Herbert W. Erskine and Louis Ferrari, Esqs., are present as counsel; Bank of America National Trust & Savings Association, as Administrator-with-the-Will-Annexed of the Estate of John M. Grant, deceased, for whom G. L. Berrey, Esq., is present as counsel; Walston & Co., a co-partnership, et al., for whom Claude N. Rosenberg, Esq., is present as counsel; Vincent A. Marco, Percy V. Clibborn, Homer N. Boardman, Esqs., being present as counsel for the plaintiff; and A. H. Bargion, Court Reporter, being present and reporting the proceedings:

Attorney Boardman argues further in opposition to all motions.

At 11:40 A. M. court recesses. At 11:45 A. M. court reconvenes herein. Attorney Boardman resumes argument.

At 1:03 P. M. court recesses until 2 P. M. At 2:05 P. M. court reconvenes herein. Attorney Boardman argues further in opposition to all motions.

The Court makes a statement re its present views.

It is ordered that the plaintiff serve and file amended complaint within sixty (60) days and that the defendants have thirty (30) days thereafter to plead thereto. [122]

At a stated term, to-wit: The February Term, A.D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 17th day of August, in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable: C. E. Beaumont District Judge.

[Title of Cause.]

No. 1490-H Civil

ORDER EXTENDING TIME TO FILE
AMENDED COMPLAINT

Homer N. Boardman, Esq., counsel for the plaintiff, now comes before the Court and moves for extension of time to file amended complaint.

It is ordered that time for filing amended complaint be, and it hereby is, extended to August 21, 1942, inclusive. [123]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

[124]

Comes Now the above named plaintiff complaining of the above named defendants, and for her cause of action alleges upon information and belief, except as to paragraphs III, V, XVIII, XLI, and XLII, which plaintiff alleges upon knowledge, as follows:

I.

Defendant, Transamerica Corporation, has been since on or about the 11th day of October, 1928, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and at all times mentioned herein transacting business within the State of California, having its principal office and place of business in said state in the City and County of San Francisco.

II.

Defendant, Transamerica Corporation, has been at all times since its incorporation, and was at all times herein mentioned, and now is, duly authorized to engage in and engaged in numerous business enterprises, including among others a general business involving and devoted to financial, investment, brokerage, [125] insurance, and real estate enterprises, and also a general business of organizing, acquiring, holding, owning, controlling, maintaining and operating, other corporations and associations as its corporate subsidiaries, instrumentalities and departments, in the operation of its said business enterprises, and including among others, the following corporate subsidiaries, departments and instrumentalities, to-wit:

Bank of America National Trust and Savings Association, a national banking association ;

Bankitaly Company of America, a corporation ;

Corporation of America, a corporation ;

Transamerica Insurance Holding Company, a corporation ;

Transamerica General Holding Company, a corporation;

Transamerica General Corporation, a corporation;

American Brokerage Company, a corporation;

Transamerica Service Corporation, a corporation;

Bankamerica Company, a corporation;

Inter-Coast Trading Company, a corporation;

Bankitaly Mortgage Company, a corporation;

Pacific Coast Mortgage Company, a corporation;

Associated American Distributors, Inc., a corporation;

Western States Corporation, a corporation;

Bank of America Company, a corporation;

Service Corporation, a corporation;

California Lands Inc., a corporation;

Capital Company, a corporation;

Inter-American Corporation, a corporation;

Occidental Life Insurance Company, a corporation;

Pacific National Fire Insurance Company, a corporation;

Commercial Holding Fire Insurance Company, a corporation;

Transamerica Bank Holding Company, a corporation;

Inter-Continental Corporation, a corporation;

[126]

Bancitaly Corporation, a corporation; and

National Bankitaly Company, a corporation.

III.

Plaintiff is, and has been at all times since on or about the 7th day of March, 1929, a shareholder of defendant Transamerica Corporation, and is the owner and holder of fifty-seven (57) shares of its capital stock, and as such shareholder institutes this action on behalf of herself, said corporation, and all other shareholders thereof similarly situated.

IV.

Bank of America National Trust & Savings Association, a national banking association, sued as a defendant herein as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, deceased, is, and was at all times mentioned herein, a national banking association duly organized, acting and existing, under and by virtue of the laws of the United States, with its principal offices and places of business in the City and County of San Francisco, and the City of Los Angeles, County of Los Angeles, in the State of California, and then and there duly authorized to engage and engaging in a general banking and trust company business.

V.

Plaintiff is, and was at all times mentioned herein, a citizen and resident of the State of New York.

VI.

Defendant Transamerica Corporation, a corporation, is and was at all times mentioned herein, a citizen and resident of the State of Delaware.

VII.

Defendant co-partnership Walston & Co., is and was and at all times mentioned here, a co-partnership composed of two or more persons associated and transacting business under said common [127] name, the members thereof, among others, being the following individual defendants herein named, to-wit: Charles De Y. Elkus, Vernon C. Walston, William S. Hoelscher, C. J. Smith, Clifford P. Hoffman, Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman, and Virgil D. Giannini, now deceased.

VIII.

Defendant Walston & Co., a co-partnership is, and at all times mentioned herein was, engaged in a security brokerage business in the State of California, with its principal office and place of business in the City and County of San Francisco, and at all such times was and now is a citizen and resident of the State of California.

IX.

Plaintiff is ignorant of the true names of the defendants designated and sued herein by and under fictitious names, and for that reason they are sued herein under fictitious names; and plaintiffs prays that when their true names are ascertained that they may be inserted herein, and that they may thereupon and thereafter be proceeded against in all subsequent proceedings in this action under their true names.

The aforesaid persons, corporations and associations, sued herein as defendants under fictitious names, and each of them, participated with the other defendants in all and singular the acts and wrongs herein alleged and complained of.

X.

Each and all of the individual defendants named herein are citizens and residents of the State of California. Defendants, A. H. Giannini, Russ Avery and C. R. Bell all reside in Los Angeles County, and W. N. Lagomarsino resides in the County of Ventura, in said state; and defendant Gordon Gray resides in the County of San Diego, in said state.

[128]

XI.

On or about the 28th day of April, 1938, the aforesaid Virgil D. Giannini mentioned in paragraph VII herein, died testate in the City and County of San Francisco, State of California, and thereafter the aforesaid defendant, Amadeo P. Giannini, was appointed the Executor of his Last Will and Testament and estate, and thereupon duly qualified as such Executor and has ever since been and still is acting as such.

XII.

On or about the 25th day of March, 1941, the aforesaid John M. Grant, mentioned and named in paragraph XIX hereof, died testate in the City and County of San Francisco, State of California, and thereafter the defendant, Bank of America National

Trust & Savings Association, a national banking association, was duly appointed the Administrator-With-The-Will-Annexed of his estate, and there-upon duly qualified as such Administrator, and ever since has been and still is acting as such.

XIII.

Defendant Amadeo P. Giannini, as Executor of the Last Will and Testament of Virgil D. Giannini, deceased, is, and at all times mentioned herein was, a citizen and resident of the State of California.

XIV.

Defendant Bank of America National Trust & Savings Association, a national Banking association, as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, deceased, is, and at all times mentioned herein was, a citizen and resident of the State of California.

XV.

The jurisdiction of this Court depends upon a diversity of citizenship between the plaintiff and the defendants. [129]

XVI.

This action is not a collusive one instituted for the purpose of conferring on a Court of the United States jurisdiction of an action of which it would not otherwise have cognizance.

XVII.

The matter in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand and no/100 Dollars (\$3,000.00).

XVIII.

Plaintiff was a shareholder of the defendant, Transamerica Corporation, at the time of each and all of the transactions of which she complains herein.

XIX.

On or about the 11th day of October, 1928, all of the individual defendants named and described herein, together with the aforesaid Virgil D. Gianini and John M. Grant, both now deceased, and each of them, together with certain other persons not named or sued as defendants herein, but who are referred to hereinafter, and named and described in paragraph XXIII hereof, together with other persons whose names are not known to the plaintiff herein, then and there conspired and confederated with each other, and have ever since so conspired and confederated to control, operate, maintain, conduct and use defendant Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, and its and their corporate business and affairs, for their own private, personal and individual, use and benefit, and to the detriment of said defendant corporation, its corporate subsidiaries, departments and instrumentalities, and its shareholders, and for such purpose, and without legal right or authority, to wrongfully

appropriate to their own individual use and benefit, the monies, funds, assets and property, of said defendant, Transamerica Corporation, and its corporate subsidiaries, departments [130] and instrumentalities, and also without legal right or authority, to wrongfully use the monies, funds, assets, property and facilities thereof, and also to use their official position with said defendant, Transamerica Corporation, and the confidential and special knowledge gained thereby, for their own individual use and benefit, and for the purpose of effecting such common design; and as a part of said conspiracy and confederation, said conspiring defendants and persons, and each of them, further agreed by and between themselves as follows:

(a) that said conspiring defendants and persons should and would at all times obtain, have and maintain, control of the issued and outstanding voting shares of the capital stock of defendant Transamerica Corporation, and at all times, by virtue of such control, select, elect, maintain control of, and dominate, all of the individual members of all its Boards of Directors, and all its principal officers, and control, dominate, dictate, determine and direct all its business, affairs, and policies.

(b) that a majority of or all the individual members of all the Boards of Directors and a majority or all of the principal officers of defendant Transamerica Corporation would and should at all times be selected, elected and maintained, from the membership of said conspiracy; and that in the event any of the individual members of all the

Boards of Directors of defendant Transamerica Corporation so selected, elected and maintained, were not members of said conspiracy, that they would and should at all times be entirely and completely dominated and controlled by said conspiring defendants and persons to the extent that each of such non-conspiring individual members of such Boards of Directors, if any, would and should at all times be a puppet or dummy for and the alter ego of said conspiring defendants and persons, and would and should at all times, in the performance of their official duties, and all corporate acts and transactions, respond entirely and completely to [131] the will and desire of said conspiring defendants and persons, and exercise no independent judgment nor discretion concerning the same.

(c) that by and through such Boards of Directors so selected, elected, controlled and maintained, defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, would and should be caused to apply and use its and their monies, funds, property and facilities to organize, acquire, finance and maintain, various private, personal and individual business enterprises to be owned and conducted by and for the personal and private interests, gain and profit of, said conspiring defendants and persons, or some of them;

(d) that by and through such Boards of Directors so selected, elected and maintained, defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, would

and should be caused to assume, make and enter into, fraudulent, fictitious and pretended, contracts and agreements, falsely purporting to evidence legal and valid transactions with, and legal rights of, the said conspiring defendants and persons, or some of them, to be used as subterfuges, and to give color of right to transactions whereby large and substantial sums of money belonging to defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, would and should, from time to time, without legal right or authority, be withdrawn, misappropriated and converted, by said conspiring defendants and persons, or some of them, to their private, individual and secret use, benefits, gain, and profit.

(e) that said conspiring defendants and persons would and should, from time to time, by the use of their official positions with defendant Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, and the confidential and special knowledge gained thereby, manipulate the capital stock of defendant Transamerica Corporation upon the various national [132] securities exchanges, and engage in secret, private and personal, speculations therein, and the acquirement of secret, private and individual gain and profit thereby, and that to facilitate and effect said objects, such Boards of Directors, so selected, elected and maintained, by said conspiring defendant and persons, would and should, without legal right or authority, cause defendant Transamerica Corporation,

and its corporate subsidiaries and departments, to apply and use its and their assets, monies, funds and property, to finance all such manipulations and speculations and pay all expenses thereof and the losses sustained thereby.

(f) that by and through such Boards of Directors of defendant Transamerica Corporation so selected, elected, controlled and maintained, the investment, security brokerage and other businesses of said defendant Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, would and should, without legal right or authority, be diverted and transferred to other corporations, associations and co-partnerships, which would and should be secretly organized, acquired, owned, controlled and operated by said conspiring defendants, and other persons, or some of them, for their individual use, benefit, and private secret profit.

(g) that in order to give the corporate transactions and acts to be performed in the execution by said conspiring defendants and other persons of their said conspiracy the appearance of ordinary routine business transactions and not transactions of such importance as to require the careful consideration of all of the members of the Board of Directors, and that said transactions should not have the appearance of being the result of a carefully planned scheme, that some of the directors of defendant Transamerica Corporation should propose, and affirmatively present and support the authorization of such transactions and acts, and that as long

as a quorum of the Board of Directors was present on such occasions, that [133] others of said conspiring directors, should passively permit and acquiesce therein by remaining absent from the directors meetings when and where such corporate acts and transactions were to be authorized.

(h) that each and all of the corporate transactions and acts contemplated and deemed necessary by said conspiring defendants and persons to effect the common design of their said conspiracy and confederation would and should, at all times, be covered, disguised and concealed from all shareholders and directors of defendant Transamerica Corporation other than said conspiring defendants and persons, and to effect such concealment, that all of such corporate transactions and acts would and should fail to truthfully appear upon, or be reflected by, the corporate records and books of account of defendant Transamerica Corporation, or its corporate subsidiaries, departments and instrumentalities, but on the other hand, would and should be entirely withheld therefrom, or included therein under, and camouflaged by, false, fictitious, untrue, and misleading names, designations, and accounts, wherein and whereby the individual, private, and secret interests of the conspiring defendants and other persons therein, would and should be entirely and completely concealed.

(i) that in the event said conspiring defendants and persons for any particular year or other period of time, would or should fail to have and maintain

a control of the voting shares of the capital stock of the defendant Transamerica Corporation, and the selection, election and maintenance of its directors, then nevertheless, the defendant's said conspiracy and confederation, would and should not terminate, but thereafter, that said conspiring defendants and other persons, would and should attempt to regain control of such voting stock of said defendant, Transamerica Corporation, and if successful in so doing, then said conspiracy and confederation, and the common design and understanding thereof [134] as heretofore set forth, would and should continue to exist, function and be effective, as originally planned and agreed, and would and should continue indefinitely until completely and successfully terminated.

XX

Thereafter, from time to time, and for the purpose of effecting the said conspiracy and confederation, and to carry out the common purpose and design thereof as heretofore set forth, the said defendants and persons committed and performed the following acts, and engaged in the following transactions and series of transactions, as set forth in the succeeding paragraphs hereof, namely, XXI to XL, inclusive.

XXI

At and during all of the times mentioned herein, and up to and including the date of the filing of this amended complaint, said defendants and persons, at all such times, procured, obtained, had, held, and

exercised full, complete and exclusive control of all of the issued and outstanding voting shares of capital stock of defendant Transamerica Corporation, and at and during all such times, by such control of said voting shares of stock, selected, named and elected, all the individual members of said defendant corporation's several Boards of Directors, and during all such times, wholly, fully, exclusively, and completely controlled, dominated, determined, and directed the entire business policies, and affairs of defendant Transamerica Corporation.

XXII

By and through the said control of the issued and outstanding voting shares of the capital stock of defendant Transamerica Corporation had and held by said defendants and persons, each of the following named individual defendants herein was from time to time duly elected a member of the Board of Directors of said defendant, Transamerica Corporation, and accepted and assumed [135] the corporate powers, duties and liabilities, of such office, and served and acted as a director of said corporation; and that said defendants were so elected on or about the approximate dates, and served as directors during the approximate periods of time, hereinafter set forth, plaintiff being unable to make a more definite or certain statement with respect thereto:

| Name of Director | Elected and Held Office From on or About | Held Office To on or About |
|----------------------|---|---------------------------------|
| *Amadeo P. Giannini | Oct. 11, 1928 Feb. 15, 1932 (and to present time) | Sept. 22, 1931 Mar. 26, 1942 |
| *James C. Bacigalupi | Oct. 11, 1928 | Feb. 15, 1932 |
| *P. C. Hale | Oct. 11, 1938 | Sept. 22, 1931 |
| L. M. Giannini | Jan. 8, 1929 Feb. 6, 1933 (and to present time) | Mar. 26, 1931 Mar. 26, 1942 |
| A. H. Giannini | Jan. 8, 1929 | Sept. 22, 1931 |
| William E. Blauer | Jan. 8, 1929 | Sept. 22, 1931 |
| Leon Bocqueraz | Jan. 8, 1929 | Sept. 22, 1931 |
| Charges N. Hawkins | Jan. 8, 1929 | Sept. 22, 1931 |
| W. F. Morrish | Jan. 8, 1929 | Sept. 22, 1931 |
| A. J. Mount | Jan. 8, 1929 | Sept. 22, 1931 |
| Alfred E. Sbarboro | Jan. 8, 1929 | Sept. 22, 1931 |
| E. J. Nolan | Jan. 8, 1929 | Sept. 22, 1931 |
| Armando Pedrini | Jan. 8, 1929 | Feb. 15, 1932 |
| George A. Webster | Jan. 8, 1929 Sept. 17, 1929 | Feb. 9, 1929 Sept. 22, 1931 |
| C. R. Bell | Jan. 8, 1929 | Sept. 4, 1931 |
| W. W. Garthwaite | Feb. 9, 1929 | Sept. 22, 1931 |
| George N. Armsby | Jan. 20, 1930 | Sept. 22, 1931 |
| E. H. Clark | Jan. 20, 1930 | Nov. 24, 1931 |
| Louis Ferrari | Jan. 20, 1930 | Sept. 22, 1931 |
| V. Scialoja | March 26, 1931 April 6, 1932 | Feb. 15, 1932 Nov. 19, 1933 |
| [136] | | |
| Charles De Y. Elkus | Feb. 15, 1932 | Apr. 6, 1932 |
| John M. Grant | Feb. 15, 1932 | Mar. 25, 1941 |

*(Amadeo P. Giannini, James C. Bacigalupi and P. C. Hale, acted as directors for defendant, Trans-america Corporation, from the time of its incorporation, on or about October 11, 1928, until January 8, 1929, at which time the first meeting for the regular election of directors was apparently held, and at which time said three (3) directors were elected, together with various other directors also elected at said meeting).

| Name of Director | Elected and Held Office From on or About | Held Office To on or About |
|----------------------|---|-------------------------------|
| A. J. Scampini | Feb. 15, 1932 | Apr. 6, 1932 |
| | Mar. 30, 1933 | Aug. 6, 1939 |
| Theodore M. Stuart | Feb. 15, 1932 | Mar. 28, 1940 |
| Russ Avery | Apr. 6, 1932 | Mar. 26, 1942 |
| | (and up to present time) | |
| P. A. Bricca | Apr. 6, 1932 | Mar. 26, 1942 |
| | (and up to present time) | |
| George J. De Martini | Apr. 6, 1932 | Mar. 26, 1942 |
| | (and up to present time) | |
| Gordon Gray | Apr. 6, 1932 | Mar. 26, 1942 |
| | (and up to present time) | |
| O. D. Hamlin | Apr. 6, 1932 | Mar. 26, 1942 |
| | (and up to present time) | |
| T. W. Harris | Apr. 6, 1932 | Aug. 31, 1939 |
| A. P. Jacobs | Apr. 6, 1932 | Mar. 26, 1942 |
| | (and up to present time) | |
| Chester H. Loveland | Apr. 6, 1932 | Mar. 30, 1933 |
| F. G. Stevenot | Apr. 6, 1932 | Oct. 19, 1938 |
| Herbert E. White | Apr. 6, 1932 | Aug. 10, 1939 |
| W. N. Lagomarsino | Aug. 22, 1932 | Mar. 26, 1942 |
| | (and up to present time) | |

XXIII

By and through the said control of the issued and outstanding voting shares of the capital stock of defendant Trans- [137] america Corporation had and held by said defendants and persons, each of the following persons, although not sued as defendants herein, was from time to time duly elected a member of the Board of Directors of said defendant, Transamerica Corporation, and accepted and assumed the corporate powers, duties and liabilities of such office, and served and acted as a director of said corporation; and that said conspiring persons were so elected on or about the approximate dates, and served as directors during

the approximate periods of time, hereinafter set forth, plaintiff being unable to make a more definite or certain statement with respect thereto:

| Name of Director | Elected and Held Office From on or About | Held Office To on or About |
|---------------------|---|-------------------------------|
| L. V. Belden | Jan. 8, 1929 | Sept. 17, 1929 |
| Edward C. Delafield | Jan. 8, 1929 | Sept. 4, 1931 |
| J. E. Rovensky | Jan. 8, 1929 | Sept. 4, 1931 |
| W. H. Snyder | Jan. 8, 1929 | Feb. 8, 1930 |
| Harry Bronner | May 29, 1929 | Sept. 4, 1931 |
| Hunter S. Marston | May 29, 1929 | Sept. 22, 1931 |
| Elisha Walker | May 29, 1929 | Feb. 15, 1932 |
| Paul D. Cravath | Jan. 20, 1930 | Feb. 15, 1932 |
| Jean Monnet | Jan. 20, 1930 | Feb. 15, 1932 |
| Georges Jouasset | July 15, 1930 | Feb. 15, 1932 |
| E. R. Tinker | Jan. 20, 1930 | Sept. 22, 1931 |
| H. P. Preston | Feb. 8, 1930 | Sept. 4, 1931 |
| Alvino Angelo | Mar. 26, 1931 | Sept. 22, 1931 |
| A. E. Carpenter | Mar. 26, 1931 | Mar. 26, 1931 |
| | Sept. 4, 1931 | Oct. 1, 1931 |
| F. R. Kerman | Mar. 26, 1931 | Mar. 26, 1931 |
| | Sept. 4, 1931 | Oct. 1, 1931 |
| C. T. Purdy | Mar. 26, 1931 | Mar. 26, 1931 |
| | Sept. 4, 1941 | Sept. 22, 1931 |
| L. H. Cook | Sept. 4, 1931 | Oct. 1, 1931 |
| [138] | | |
| F. W. Allen | Sept. 22, 1931 | Feb. 15, 1932 |
| A. E. Cotting | Sept. 22, 1931 | Feb. 15, 1932 |
| H. O. Havemeyer | Sept. 22, 1931 | Feb. 15, 1932 |
| George Murmane | Sept. 22, 1931 | Feb. 15, 1932 |
| R. L. Redmond | Sept. 22, 1931 | Feb. 15, 1932 |
| Frederic C. Dumaine | Oct. 1, 1931 | Feb. 15, 1932 |
| Charles W. Nash | Oct. 1, 1931 | Feb. 15, 1932 |
| Fred W. Sargent | Oct. 1, 1931 | Feb. 15, 1932 |
| Edward I. Berry | Feb. 15, 1932 | Apr. 6, 1932 |
| George Buck | Feb. 15, 1932 | Apr. 6, 1932 |
| Ivan Culbertson | Feb. 15, 1932 | Feb. 24, 1932 |
| John C. Jury | Feb. 15, 1932 | Apr. 6, 1932 |
| Frank J. McCarthy | Feb. 15, 1932 | Apr. 6, 1932 |
| J. E. McClellan | Feb. 15, 1932 | Apr. 6, 1932 |
| Theodore Roche, Jr. | Feb. 15, 1932 | Apr. 6, 1932 |

| Name of Director | Elected and Held Office From on or About | Held Office To on or About |
|----------------------|---|-------------------------------|
| Herbert E. Salinger | Feb. 15, 1932 | Apr. 6, 1932 |
| Alexander L. Nichols | Feb. 15, 1932 | Feb. 24, 1932 |
| Edwin D. Stayton | Feb. 15, 1932 | Feb. 24, 1932 |
| R. C. Springer | Feb. 15, 1932 | Feb. 15, 1932 |
| Edwin D. Steel, Jr. | Feb. 15, 1932 | Feb. 24, 1932 |
| Fred L. Dreher | Feb. 24, 1932 | Apr. 6, 1932 |
| G. Ferro | Apr. 6, 1932 | Apr. 26, 1932 |
| Ercole H. Locatelli | Apr. 6, 1932 | Feb. 6, 1933 |
| Jas. F. Cavagnaro | Mar. 29, 1934 | Dec. 30, 1938 |
| | Mar. 26, 1932 | to present time |
| W. W. Douglas | Mar. 28, 1940 | Dec. 13, 1940 |
| E. D. Woodruff | Mar. 28, 1940 | Mar. 26, 1942 |
| | (and to present time) | |
| R. P. A. Everard | Mar. 27, 1941 | Mar. 26, 1942 |

XXIV

At and during all of such times heretofore mentioned, [139] each of the individual members, if any. of all such several Boards of Directors of defendant Transamerica Corporation who was not or did not become a member of said conspiracy and confederation, was a puppet, dummy, and the alter ego of said defendants and persons, and by them at all such times, wholly and completely, controlled, directed, dominated, to the end and to the extent that in the performance of the official duties of each thereof, and in all the corporate acts and transactions of defendant Transamerica Corporation, including all the corporate acts and transactions herein set forth, said dummy directors, and each of them, exercised no independent judgment or discretion, but upon and at all such times, and in all such corporate acts and transactions, responded to and reflected the will and desire of said defendants and persons.

XXV

At and during all of said times each of the individual members, if any, of such several Boards of Directors of defendant Transamerica Corporation who was not, or did not become, a member of said conspiracy, or a puppet and dummy director as hereinbefore in paragraph XXIV alleged, either failed to discover any of the wrongful acts herein complained of, or, on the other hand, having discovered the same, at all times thereafter, knowingly and in complete disregard of his official duties, wholly failed to take action to redress or prevent the continuance of such wrongs, or to cause such action to be taken.

XXVI

On or about the 25th day of May, 1929, said defendant and persons, acting by and through their said Board of Directors of defendant Transamerica Corporation and without legal right or authority, caused said corporation and its corporate subsidiaries, departments and instrumentalities, to acquire, and absorb all of the capital stock, and assets of a certain corporation theretofore owned, operated, maintained and controlled by defendants Amadeo P. Giannini, P. C. Hale, and James A. Bacigalupi, and other persons, [140] and known and described as Bancitaly Corporation, and appear to assume as its own obligations certain pretended, fraudulent, and fictitious liabilities of said Bancitaly Corporation, including a certain pretended, fraudulent and fictitious, salary agreement by and between defendant Amadeo P. Giannini and said Bancitaly Corporation, to the effect that for his personal services

to be rendered as president of said corporation, said Amadeo P. Giannini should receive and be paid 5% of the net profits of said corporation, per annum, with a guaranteed minimum of One Hundred Thousand Dollars (\$100,000.00) per annum, commencing January 1, 1927, in lieu of salary; and also including certain pretended, fraudulent and fictitious, credit entries made pursuant thereto, then appearing under false and fictitious names and designations upon the books of account of said Bancitaly Corporation, in favor of defendants Amadeo P. Giannini, L. M. Giannini, and the aforesaid Virgil D. Giannini (now deceased), in substantial sums, aggregating approximately Nine Hundred and Twenty-five Thousand Dollars (\$925,000.00), all of which was so caused by the said defendants and persons, for the purpose and with the intent of each of them to thereafter use said pretended salary agreement and credit entries as subterfuges and instrumentalities by and through which to unjustly enrich themselves, and enhance their personal and individual interests, and particularly to enhance the personal and individual interests of and unjustly enrich said defendants, Amadeo P. Giannini and L. M. Giannini, and the said Virgil D. Giannini (now deceased), to the detriment of defendant Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities, and shareholders, in the particulars hereinafter mentioned.

Said pretended, fraudulent and fictitious, liability of said Bancitaly Corporation, evidenced by said

salary agreement, had prior to the time of the transactions heretofore set forth in this paragraph, and during a period of time commencing on or about the [141] 13th day of April, 1927, and ending on or about the 25th day of May, 1929, been made, created, and established, by the said defendants, Amadeo P. Giannini, P. C. Hale, and James A. Bacigalupi, for the purpose of, and used as a subterfuge, and as an instrumentality evidencing apparent legal rights, to wrongfully obtain, appropriate, and convert the monies, funds, and assets of said Bancitaly Corporation to the individual use and benefit of said defendants, Amadeo P. Giannini and L. M. Giannini, and the said Virgil D. Giannini (now deceased), by computing the net profits of said Bancitaly Corporation upon false, fictitious, unearned and unrealized profits, and entering from time to time, upon its corporate books of account, amounts purporting to be 5% of such false, fictitious, unearned and unrealized net profits, as credit entries in favor of said defendants, Amadeo P. Giannini and L. M. Giannini, and the said Virgil D. Gannin (now deceased), including the said credit entries aggregating approximately Nine Hundred and Twenty-five Thousand Dollars (\$925,000.00) heretofore mentioned.

XXVII

During the period of time commencing on or about the 5th day of April, 1929, and ending on or about the 1st day of January, 1930, a more certain or definite statement thereof plaintiff being unable

to set forth, pursuant to said purported fraudulent and fictitious corporate liability evidenced by said salary agreement set forth in paragraph XXVI hereof, said defendants and persons, acting by and through their said Boards of Directors of defendant Transamerica Corporation, from time to time, and without legal right or authority, caused said defendant and its corporate subsidiaries, departments and instrumentalities, to make and enter certain purported, false, fraudulent and fictitious, credit entries in favor of the defendants, Amadeo P. Giannini and L. M. Giannini, and the aforesaid Virgil D. Giannini (now deceased), in substantial sums aggregating not less than Three Million, Seven Hundred Thou- [142] sand Dollars (\$3,700,000.00) upon the corporate records and books of account of said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, as purported liabilities thereof, concerning all of which, plaintiff is unable to make a more definite or certain statement with respect to the dates and amounts of the several items of such credit entries.

Plaintiff further alleges with respect to the said credit entries and records aforesaid, that the total credit and each item thereof so entered and recorded upon the corporate records and books of account of defendant Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, in favor of the defendants, Amadeo P. Giannini and L. M. Giannini, and the said Virgil D. Gianinni (now deceased), was and is false, fraud-

ulent, fictitious and untrue, in that the same does not truly and correctly represent 5% of the actual and true net profits of said corporation and its corporate subsidiaries, departments and instrumentalities, for said period or any part thereof. but on the other hand, was by said defendants and persons, and each of them, knowingly computed upon false, fictitious, unearned and unrealized profits, and all of which was so caused to be done by said defendants and persons, for the purpose, and with the intent of each of them, to unjustly enrich themselves and enhance their personal and individual interests, and particularly to enhance the personal and individual interests of, and unjustly enrich the defendants, Amadeo P. Giannini and L. M. Giannini, and the said Virgil D. Giannini (now deceased), to the detriment of defendant Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities, and shareholders, in the particulars hereinafter mentioned.

XXVIII

During a period of time commencing on or about the 5th day of April, 1929, and ending on or about the 1st day of January, 1939, said defendants and persons, acting by and through their said [143] Boards of Directors of defendant Transamerica Corporation, and without legal right or authority, caused said defendant corporation and its corporate subsidiaries, departments and instrumentalities, to pay to the defendants Amadeo P. Giannini and L. M. Giannini, and the said Virgil D. Giannini (now

deceased), from time to time, substantial sums of money aggregating not less than approximately Three Million, Seven Hundred Thousand Dollars (\$3,700,000.00), on account of and by reason of said false, fraudulent, fictitious and untrue, credit entries heretofore set forth in paragraphs XXVI and XXVII hereof, the precise amount and dates of said payments being to plaintiff unknown, except with respect to a sum not less than approximately One Million, Two Hundred and Seventy-one Thousand, Six Hundred and Forty-seven Dollars (\$1,271,647.01) and One Cent, which plaintiff alleges was so caused to be paid by defendant Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, in the manner aforesaid, to the said defendants, Amadeo P. Giannini and L. M. Giannini, and the said Virgil D. Giannini (now deceased), in the approximate sums and amounts as follows:

- \$ 212,852.59 in and during the year 1930;
- \$ 266,977.71 in and during the year 1931;
- \$ 134,826.58 in and during the year 1932;
- \$ 132,896.92 in and during the year 1933;
- \$ 100,596.24 in and during the year 1934;
- \$ 251,952.03 in and during the year 1935;
- \$ 65,914.29 in and during the year 1936;
- \$ 58,284.37 in and during the year 1937;
- \$ 34,000.00 in and during the year 1938; and
- \$ 13,346.28 in and during the year 1939;

by reason of all of which the said defendants and persons, and particularly defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Gian-

nini (now deceased), were from the funds and assets [144] of defendants Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, unjustly enriched to the serious and irremediable injury and detriment of said defendant corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders, to the extent of at least Three Million and Seven Hundred Thousand Dollars (\$3,700,000.00), the precise sum and amount thereof being to plaintiff unknown, and all of which the said defendants and persons, caused to be done with the intent of each of them to unjustly enrich themselves and enhance their personal and individual interests, and particularly to enhance the personal and individual interests of, and unjustly enrich, the said defendants Amadeo P. Giannini and L. M. Giannini and the said Virgil D. Giannini (now deceased), to the detriment of defendant Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders.

XXIX

During all of the times herein mentioned and involving all of the corporate transactions and acts herein set forth, the said defendants and persons, by and through their respective and several Boards of Directors, caused all such transactions and acts, and the general business and affairs of defendant Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, and its assets and liabilities, to appear and be reflected

by records and books of account kept, maintained, and manipulated by an involved, intricate and complex system of accounting, in conflict with the usual, customary, and proper and recognized principles of the science of accounting, and entirely beyond the knowledge and understanding of the plaintiff with respect to such subjects, and that the corporate transactions and acts herein set forth, involved in such corporate records and books of account with respect to the assets and liabilities of defendant Transamerica Corporation, its corporate subsidiaries, departments and [145] instrumentalities, set forth in paragraphs XXVI and XXVII hereof, and with respect to the payments and disbursements involved and set forth in paragraph XXVIII hereof, were at all times covered, disguised, concealed and camouflaged, by entries and records made under and by false, fictitious, misleading and untrue, names and designations not required by and in conflict with the usual, customary, proper and recognized principles of the science of accounting, and thus wholly and entirely concealed.

XXX

On or about the 17th day of December, 1932, at a time when defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, were actively engaged in and enjoying a substantial, profitable investment, security, and brokerage business, the said defendants and persons, acting by and through defendant L. M. Giannini and the said Virgil D. Giannini (now

deceased), for the purpose and with the intent on the part of each and all of them, without legal right or authority, to acquire and thereafter have and conduct said investment, security and brokerage business for their personal, private, individual and secret profit and gain, and to unjustly enrich themselves and enhance their personal and individual interests, and particularly to enhance the personal and individual interests of and unjustly enrich defendants, Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman and the said Virgil D. Giannini (now deceased), to the detriment of defendant Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders, caused the defendant co-partnership, Walston & Co., to be formed, organized and created, with the individual members thereof as set forth in paragraph VII thereof.

XXXI

At all times after the formation and organization of the said defendant co-partnership, Walston & Co., and during the years [146] 1933, 1934, 1935, 1936, 1937 and 1938, in the manner for the purpose heretofore set forth, said defendants and persons, by and through their said Boards of Directors of defendant Transamerica Corporation, and without legal right or authority, caused said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, to transfer and divert all of the said investment, security and brokerage business thereof, and of which said Boards of Directors then and there had and

exercised management and control, to the said defendant co-partnership, Walston & Co., and all of which was from time to time during said years accomplished by said defendants and persons, with the intent of each of them to unjustly enrich themselves and enhance their personal and individual interests and particularly to enhance the personal and individual interests of and unjustly enrich the defendants, Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman and the said Virgil D. Giannini (now deceased), to the detriment of defendant Transamerica Corporation and its corporate subsidiaries, departments, instrumentalities and shareholders, in the particulars hereinafter mentioned.

XXXII.

In and during the said years 1933, 1934, 1935, 1936, 1937 and 1938, said defendants and persons, by and through their Boards of Directors of defendant Transamerica Corporation without legal right or authority, caused said defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, from time to time, to pay and disburse from the funds, assets and property thereof, to said defendant co-partnership, Walston & Co., large and substantial sums of money as brokerage and other fees with respect to security, corporate stock and other transactions rendered in connection with the business so diverted and transferred as set forth in paragraph XXXI hereof, which at all such times belonged to defendant Transamerica Corporation and its [147] corporate subsidiaries, departments and instrumen-

talities, together with other large and substantial sums of money for use as capital for and in behalf of said defendant co-partnership, Walston & Co., and other purposes with respect to which plaintiff is unable to make a more definite or certain statement concerning the precise dates, items and amounts of said payments, but alleges that the same aggregated a total sum of not less than approximately Five Hundred and Forty-eight Thousand Dollars (\$548,000.00), and all of which was so received and accepted by the said defendant co-partnership, Walston & Co., and the individual members thereof, for the private, personal and individual use, benefit, gain and profit of the said defendants and persons herein, and all of which was thereafter, from time to time, by said defendant co-partnership, Walston & Co., and each of its said individual members, knowingly disbursed to and divided between the said defendants and persons, and particularly the defendants Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman and the said Virgil D. Giannini (now deceased), all of whom were thereby, from the funds, monies, assets and property of defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, unjustly enriched to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, in the sum and amount and to the extent of at least approximately Five Hundred and Forty-eight Thousand Dollars (\$548,000.00).

XXXIII.

All of the transactions and acts mentioned and set forth in paragraphs XXX, XXXI and XXXII hereof concerning the formation and organization of the defendant co-partnership, Walston & Co., and the interests of said defendants and persons therein and the acquirement, division and distribution, of the earnings and profits thereof, were at all times, by said defendants and persons herein [148] withheld from the corporate records of the defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, and at all times evidenced by entirely and wholly concealed secret and private agreements and transactions, the precise nature and character of which plaintiff is unable to more definitely set forth.

XXXIV.

During the year 1932, Bankitaly Mortgage Company, a corporation, hereinbefore mentioned, was a corporation organized, acting and existing, under and by virtue of the laws of the State of California, with its principal office and place of business in the City of San Francisco, and there operating and conducting a general mortgage, real estate, investment, and security brokerage business, including speculative operations in the capital stock of defendant Transamerica Corporation, and other stocks and securities, by purchasing and selling the same upon the various national stock exchanges of the United States.

During the year 1932, the precise date of which plaintiff is unable to set forth, the said defendants and persons, by divers means and methods unknown to plaintiff, formed, organized and created a certain private and trust syndicate also having for its purpose speculative operations in the capital stock of said defendant, Transamerica Corporation, and other stocks and securities, by purchasing and selling the same upon the various national stock exchanges of the United States, wherein and whereby one Charles J. Smith, and one, Margaret Mallory, were the trustees thereof, and said defendants and persons were the beneficiaries.

XXXV.

In and during the year 1932, the precise dates of which being to the plaintiff unknown, said defendants and persons herein, by and through their said Boards of Directors of defendant Transamerica Corporation, and without legal right or authority, caused [149] said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, to pay and advance from the funds, assets and property thereof, substantial sums of money, the precise amount thereof being to plaintiff unknown, but aggregating a total of not less than approximately One Million, Five Hundred Thousand Dollars (\$1,500,000.00), to the said defendants and persons, and in particular to defendants Amadeo P. Giannini, L. M. Giannini, and the said Virgil D. Giannini (now deceased), which was by them used and disbursed to acquire the controll-

ing interest in the capital stock of said Bankitaly Mortgage Company heretofore mentioned in paragraphs XXXIV and XXXV for the purpose of controlling, maintaining and using said Bankitaly Mortgage Company as an instrument for and to carry out said speculative stock operations and manipulations of said defendants and persons, and also for the purpose of acquiring capital for such speculative stock operations and manipulations, said defendants and persons, by and through their said Boards of Directors of defendant Transamerica Corporation, and without legal right or authority, caused said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, to pay and advance from the funds, assets and property thereof, substantial sums of money, the precise amount thereof being to plaintiff unknown, but aggregating a total amount of not less than approximately One Million, Five Hundred Thousand Dollars (\$1,500,000.00) to and into the treasury of said Bankitaly Mortgage Company.

Said payments and advances of the funds, monies, assets and property, of defendant Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, was by said defendants and persons, caused to be made with the intent of said defendants and persons, and each of them, to enhance their respective personal, private and individual interests, and particularly the personal, private and individual, interests of defendants Amadeo P. [150] Giannini and L. M. Giannini, and the said Virgil D. Giannini (now deceased), to the detriment

of defendant Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders.

The precise means and methods used by said defendants and persons herein to accomplish the making of each and all of such payments and advancements of money heretofore mentioned, were and are unknown to the plaintiff, but concerning the same, plaintiff alleges that none of such transactions were open nor in the usual course of business, but on the other hand, were accomplished and consummated secretly and wholly and entirely covered, concealed and camouflaged, by and through purported loans, stock purchases and other transactions with, to, by and through, secret agents, representatives and other corporations and associations, of said defendants and persons, including one, A. O. Stuart and A. P. Giannini Company, a corporation.

XXXVI.

During the year 1932, the precise date thereof being to the plaintiff unknown, said defendants and persons, and each of them, for the purpose and with the intent of further secreting and concealing the nature and extent of their respective interests in, and control of, the said Bankitaly Mortgage Company mentioned in paragraph XXXIV hereof, by and through the Board of Directors thereof, caused its name to be changed and altered to Pacific Coast Mortgage Company mentioned in paragraph II hereof, and thereafter, during the years 1933, 1934, 1935, 1936, 1937 and 1938, by and through said

Pacific Coast Mortgage Company, and by and with the use of said defendants' and persons' positions with said defendant, Transamerica Corporation, and its corporate subsidiaries, departments, and instrumentalities, and the confidential and special knowledge and information gained thereby, operated and engaged in speculative operations and manipulations in the capital stock of defendant [151] Transamerica Corporation, and other stocks and securities, by purchasing and selling the same upon the various national stock exchanges of the United States, and that in and during said period of time, the precise days and dates thereof plaintiff being unable to state, said Pacific Coast Mortgage Company earned and collected a large and substantial profit, the precise amount of which being to plaintiff unknown, but aggregating a total of not less than approximately Two Million Dollars (\$2,000,000.00), which was from time to time, paid to, and received and accepted by, the said defendants and persons, and by reason of which said defendants and persons, were, and each of them was, unjustly enriched, and particularly the defendants, Amadeo P. Giannini and L. M. Giannini, and the said Virgil D. Giannini (now deceased), to the serious and irreparable injury and detriment of defendant Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders, in the sum and amount and to the extent of at least approximately Two Million Dollars (\$2,000,000.00).

XXXVII.

In and during the years of 1933, 1934, 1935 and 1936, the precise dates of which being the plaintiff unknown, said defendants and persons, by and through their said Boards of Directors of said Transamerica Corporation, and without legal right or authority, caused said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, from time to time, to pay and advance from the funds, property and assets thereof, substantial sums of money, the precise amounts thereof being to plaintiff unknown, but aggregating a total of not less than approximately Three Million Dollars (\$3,000,000.00), to the said trustees, Charles J. Smith and Margaret Mallory, for use as capital in operating and conducting the business and affairs of said private and secret trust syndicate mentioned in said paragraph XXXIV hereof, and which was thereafter used by said trustees and said beneficiaries [152] thereof for speculative operations in the capital stock of Transamerica Corporation and other stocks and securities upon the various national stock exchanges of the United States in the particulars hereinafter set forth.

With respect to the payment, transfer and advancements of such monies, funds, property and assets of defendant Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, to said trustees and into the treasury of said private and secret trust syndicate as heretofore

set forth, plaintiff alleges that the precise manner and methods used to accomplish the same are unknown to the plaintiff, but that said transactions were not open nor in the usual course of business, but on the other hand, were so accomplished and consummated secretly, and wholly and entirely covered, concealed and camouflaged, by and through purported loans and other transactions and acts with, to, by and through secret agents and representatives of said defendants and persons.

Concerning said payments, advancements and transfers, of the said monies, funds, property and assets, of defendant Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, to the said trustees, Charles J. Smith and Margaret Mallory, plaintiff alleges that said defendants and persons, by and through their said Boards of Directors of said Transamerica Corporation, and without legal right or authority, caused all such payments, transfers and advancements, to be made with the intent of each of them to enhance their respective personal, private and individual interests, to the detriment of the said defendant, Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders.

XXXVIII.

In and during the years 1933, 1934, 1935 and 1936, said defendants and persons, by and through said secret and private [153] trust syndicate, and with and by the use of their official positions with the defendant, Transamerica Corporation, and its

corporate subsidiaries, departments and instrumentalities, and the special and confidential knowledge and information gained thereby, operated and engaged in speculative operations in the capital stock of defendant Transamerica Corporation, and other stock and securities, by purchasing and selling the same upon the various national stock exchanges of the United States, and that in and during said period, the precise days and dates thereof plaintiff being unable to state, the said trust syndicate earned and collected a large and substantial profit, the precise amount of which being to plaintiff unknown, but aggregating a total of not less than approximately Three Hundred Thousand Dollars (\$300,000.00), which was from time to time, paid to, received and accepted by, the said defendants and persons, by reason of which said defendants and persons were, and each of them, was justly enriched to the serious and irremediable injury and detriment of the defendant, Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders, in the sum and amount, and to the extent of at least approximately Three Hundred Thousand Dollars (\$300,000.00).

XXXIX.

In and during the years 1932, 1933, 1934, 1935, 1936 and 1937, the said defendants and persons, in conducting their secret and private manipulations and speculative operations in the purchase and sale of the capital stock of defendant Transamerica Corporation, and other stocks and securities, upon the

various national stock exchanges of the United States, as set forth in paragraphs XXXIV, XXXV, XXXVI, XXXVII, and XXXVIII hereof, by and through their said Boards of Directors of said defendant, Transamerica Corporation, and without legal right or authority, caused said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, to engage in the business of manipulating [154] and stirring the market for the capital stock of defendant Transamerica Corporation, and creating a demand therefor, by soliciting orders from the general public of the United States for the purchase of the capital stock of defendant Transamerica Corporation, with respect to which plaintiff further alleges, that said defendant, Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, incurred large items of expense and suffered substantial losses in the operation of such business, the precise items and amounts thereof being unknown to the plaintiff, but aggregating a total sum of not less than approximately Two Million, Two Hundred and Fifty Thousand Dollars (\$2,250,000.00), to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders in the sum and amount of not less than approximately Two Million, Two Hundred and Fifty Thousand Dollars (\$2,250,000.00).

Concerning said expenses and losses incurred in the operation of said business of manipulating and

stirring the market for the capital stock of defendant Transamerica Corporation, plaintiff alleges that said defendants and persons, by and through their said Boards of Directors of said Transamerica Corporation, and without legal right or authority, caused the same to be made and incurred with the intent of each of them, to enhance their respective personal, private and individual interests, to the detriment of said defendant Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders.

XL.

All of the facts, matters, circumstances, things, acts and transactions mentioned and set forth in paragraphs XXXIV, XXXV, XXXVI, XXXVII, XXXVIII and XXXIX hereof, including the interests of said defendants and persons, in and to Bankitaly Mortgage Company, a corporation, Pacific Coast Mortgage Company, a corporation, [155] and the Mallory-Smith trust syndicate, and also including the relationship of said defendants and persons to each thereof and the account of their gains and profits derived therefrom, were, and each was, at all times, by said defendants and persons, withheld from the corporate records and books of account of defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, and do not appear therein, and the transfer and use of the corporate funds and assets of defendant Transamerica Corporation, its corporate subsidiaries, departments, and instrumen-

talities as in said paragraphs of this complaint set forth, were, and each item thereof was, upon the corporate records of said defendant corporation and its corporate subsidiaries, departments and instrumentalities, disguised and camouflaged, covered and concealed, by false, fictitious and misleading records importing proper use and disposition thereof.

XLI.

During all of the times mentioned herein the said defendants and persons for the purpose and with the intent heretofore alleged kept and continued to keep all of the corporate acts and transactions of the defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, of which complaint is made herein secret and hidden and concealed from plaintiff in the manner set forth in paragraphs XXIX, XXXIII, XXXV, XXXVI, XXXVII and XL hereof, concerning all of which corporate acts and transactions plaintiff was, at, and during all such times wholly ignorant and had no knowledge, notice or information, of any kind or character concerning the same, nor with respect to any irregularity or wrongful conduct of any kind or character of the defendants, or of the other persons mentioned herein, or any or either of them, concerning their management of the assets or their conduct of the business or affairs of defendant Transamerica Corporation, or its corporate subsidiaries, or departments, or in- [156] strumentalities, but on the

other hand, during all of such times, plaintiff had and reposed full and complete confidence in the integrity and good faith of defendant Amadeo P. Giannini and each and all of the directors and officers of defendant Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, in the management, control and operation of the assets, business and affairs thereof, until on or about the 27th day of April, 1939, when, for the first time, a certain quasi judicial proceeding then pending before the Securities and Exchange Commission of the United States at Washington in the District of Columbia entitled "In the Matter of Proceeding Under Section 19 (a) (2) of the Securities Exchange Act of 1934, as amended, to determine whether the registration of Transamerica Corporation capital stock, \$2.00 par value, should be suspended or withdrawn, File No. 1-2964" was called to plaintiff's attention, who thereupon investigated said proceeding and ascertained that on the 22nd day of November, 1938, the said commission had ordered a hearing for the taking of testimony beginning on the 16th day of January, 1939, for the purpose of determining whether or not the capital stock of the defendant Transamerica Corporation should be suspended or withdrawn from certain national securities exchanges, namely, the New York Stock Exchange, the Los Angeles Stock Exchange, and the San Francisco Stock Exchange, by reason of certain false and misleading statements of material facts, including financial statements of said Transamerica Corporation and its corporate

subsidiaries, departments and instrumentalities, which did not correctly reflect the true financial condition thereof and which the Commission had reasonable ground to believe had been made in said defendant Transamerica Corporation's application for registration of its said capital stock upon said stock exchanges. Plaintiff also then and there, and for the first time, ascertained the matters, facts, things, circumstances and charges contained in said order for hear- [157] ing which had been released under date of November 25, 1938, a printed official copy of which order is hereby tendered for filing in this Court for the purpose of showing the nature and extent of plaintiff's first discovery of suspicious circumstances concerning the wrongs of which complaint is made herein.

With respect to said quasi judicial proceeding and the contents of said order for hearing, plaintiff alleges that prior to the 27th day of April, 1939, she had no notice, knowledge or information of any kind or character whatsoever concerning the same, nor did she have any reason to suspect the existence of the matters, facts, things, charges and circumstances therein related, nor did she have any reason to suspect the said defendants and persons mentioned herein, or any or either of them of wrongdoing concerning the conduct of the business and affairs of the defendant Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, and further concerning said order for hearing plaintiff further alleges that the matters, facts, charges, circumstances and other matters

therein related were developed slowly by and through certain detailed examinations and audits of the corporate records and books of account of the defendant Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, by expert accountants for and in behalf of said Commission, and were presented to said Commission by the testimony of unwilling and hostile witnesses through the examination of such witnesses by experienced lawyers; and also concerning such quasi judicial proceedings plaintiff further alleges that the said issues and questions therein are still being investigated, and that said proceeding is still pending and undetermined.

After first making the discovery hereinabove set forth plaintiff, having no personal knowledge of the matters, facts, charges and circumstances related in said order for hearing and [158] desiring to determine if actionable wrongs had in fact been committed by said defendants and persons against the said defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, and shareholders, immediately proceeded to investigate and has at all times ever since diligently continued an investigation to ascertain the true and complete facts with respect to the conduct of said defendants and persons in the management and operation of the business and affairs of defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, but thus far has been unable to fully complete such investigation, and is still proceeding therewith.

XLII.

All of the individual members of the several Boards of Directors of the defendant Transamerica Corporation, during all of the times mentioned herein, and up to and including the time of the commencement of this action, are named and sued as defendants herein or are otherwise named and charged with the commission of the wrongs set forth herein, and having at all such times the complete and exclusive control of the voting shares of the capital stock of said defendant, Transamerica Corporation, and having at all such times exercised such control, the plaintiff with knowledge of such facts has made no demand of the Board of Directors of said defendant Transamerica Corporation nor of its shareholders to institute an action to redress the wrongs for which relief is sought herein as such a suit to be effective and complete must be directed against all of said defendants and persons named herein and that such a demand by plaintiff upon the Board of Directors would be and constitute a futile and idle act.

XLIII.

At all times mentioned herein and up to the time of the commencement of this action, the said defendants and persons herein named, have had and exercised complete and exclusive control of the [159] voting shares of stock of defendant Transamerica Corporation as hereinbefore alleged, and that the total issued and outstanding shares of stock of said defendant Transamerica Corporation,

are owned and held by approximately two hundred thousand (200,000) individuals and persons residing and scattered in substantially all the states and territories of the United States and numerous foreign countries, including, Alaska, Australia, Azores, Belgium, Brazil, Canada, China, Czecho-Slovakia, Denmark, Dutch East Indies, East Indies, England, France, Greece, Germany, Hawaii, Holland, India, Ireland, Italy, Japan, Mexico, New Zealand, Panama Canal Zone, Palestine, Philippine Islands, Peru, Poland, Porto Rico, Portugal, Roumania, Samoan Islands, Scotland, South Africa, Sweden, Switzerland, Spain, and West Indies, and concerning all of which plaintiff alleges that she has made no demand upon the shareholders as a body to cause action to be taken to remedy the wrongs herein complained of or to prevent the continued perpetration of such wrongs, as such a demand to be effective, would first require an expensive and prolonged struggle with said adverse Boards of Directors and persons to wrest control of all the voting shares of stock of defendant Transamerica Corporation from them, which struggle would also be a futile and idle act.

XLIV.

Plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays for judgment and decree against the defendants, and each of them as follows:

(a) That a trust relationship between plaintiff and each of said defendants, and a trust relation-

ship between defendant Transamerica Corporation and said defendants be declared;

(b) That defendants, and each of them, render a complete true and correct, accounting of all their dealings and transactions with the assets, business and affairs, of defendant Transamerica [160] Corporation, and all of their corporate acts and conduct as members of the Board of Directors and officers thereof concerning all of the transactions for which relief is sought herein;

(c) That upon such complete, true and correct accounting the court make and enter judgment and decree for plaintiff against said defendants, and each of them, in sums and amounts to which plaintiff and the defendant Transamerica Corporation may be entitled under the law and evidence, amounting in all to a sum not less than Eight Million, Seven Hundred and Ninety-eight Thousand Dollars (\$8,798,000.00), with proper legal interest thereon;

(d) For costs and expenses incurred by the plaintiff in the prosecution of this action, and an allowance of a reasonable sum to be awarded to plaintiff's counsel as a fee for their services herein:

(e) And for such other and further equitable relief to which the plaintiff may be entitled under the pleadings and evidence herein.

VINCENT ANTHONY MARCO
HOMER N. BOARDMAN
PERCY V. CLIBBORN

Attorneys for Plaintiff [161]

State of New York

County of Bronx—ss.

Rose Papantonio, being duly sworn, deposes and says she is the plaintiff in the within action; that she has read the foregoing second amended complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

ROSE PAPANTONIO

Sworn to before me this 17th day of August, 1942.

[Seal] SALVATORE MILANO

Notary Public, Bronx County, Bronx County

Clerk's No. 70, Reg. No. 185M44.

Commission expires March 30, 1944.

Form No. 1

No. 34661

State of New York,

County of Bronx—ss.

I, Michael B. McHugh, Clerk of the County of Bronx (and Clerk of the Supreme Court of said County, and Clerk of the County Court for said County, the same being Courts of Record, having by law a seal), do hereby certify that Salvatore Milano whose name is subscribed to the certificate of acknowledgment, proof, affidavit or deposition of the annexed instrument and thereon written, was on the day of the date thereof a Notary Public within and for, and residing in said County, duly commissioned, qualified and sworn, having full

power and authority by the laws of said State to take the acknowledgments of deeds or conveyances for lands, tenements and hereditaments in said State, and certify to same; also to administer oaths, to take depositions out of court, and to give certificates thereof; that full faith and credit may, and ought to be given to his official acts and attestations; that I have compared the signature on file in this office and verily believe that the signature of said certificate of acknowledgment, proof, affidavit or deposition, is his genuine official signature as appears by the records of this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, this 17 day of Aug., 1942.

[Seal]

MICHAEL B. McHUGH

Clerk [162]

Affidavit of Service by Mail

State of California

County of Los Angeles—ss.

Percy V. Clibborn, being sworn, says: That affiant is a citizen of the United States, over 18 years of age, a resident of the County of Los Angeles, State of California, and is not a party to the action, the title of which appears on the document to which this affidavit is attached.

That affiant is one of the attorneys for the plaintiff in said action, and that his place of business is 432 Rowan Building, 458 South Spring Street, in the City of Los Angeles, State of California; that affiant served a full, true and correct copy of the attached foregoing Second Amended Complaint en-

titled "Plaintiff's Second Amended Complaint" by placing said copy in an envelope addressed to Messrs. Keyes & Erskine, Herbert W. Erskine and Louis Ferrari, Attorneys at Law, at 625 Market Street, San Francisco, California; and that affiant also served a full, true and correct copy of said second amended complaint by placing said copy in an envelope addressed to Messrs. Bacigalupi, Elkus & Salinger, and Claude M. Rosenberg, Attorneys at Law, at 300 Montgomery Street, San Francisco, California, all of which said two envelopes were then sealed and postage fully prepaid thereon, and thereafter were on Friday, August 21, 1942, deposited by affiant in the United States Post Office at Los Angeles, California; and that there is delivery service by United States mail at each of the places so addressed, and that there is regular communication by mail between the place of mailing and each of the places so addressed.

PERCY V. CLIBBORN

Subscribed and sworn to before me this 21st day of August, 1942.

[Seal] EVELYN N. HOLLAND

Notary Public in and for said County and State.

My Commission Expires February 7, 1944.

[Endorsed]: Filed Aug. 21, 1942. [163]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANT AMADEO P. GIANNINI, INDIVIDUALLY AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF VIRGIL D. GIANNINI, DECEASED.

- (1) TO DISMISS THE ACTION;
- (2) FOR AN ORDER REQUIRING PLAINTIFF TO SEPARATELY STATE CAUSES OF ACTION IN SEPARATE COUNTS;
- (3) FOR A MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS, AND
- (4) TO STRIKE OUT THE ENTIRE SECOND AMENDED COMPLAINT.

Defendant Amadeo P. Giannini, individually, defendant Amadeo P. Giannini, as an alleged co-partner of defendant Walston & Co., defendant Amadeo P. Giannini, as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased, and defendant Amadeo P. Giannini, as Executor of the Last Will and Testament of Virgil D. [164] Giannini, a deceased alleged member of said co-partnership, moves the court, severally and in each of the various capacities in which he is sued as follows:

MOTION TO DISMISS

I. To dismiss the action:

(a) Because the Second Amended Complaint fails to state a claim against defendant upon which relief can be granted;

(b) Because the alleged claim set forth in said Second Amended Complaint against defendant is barred by the provisions of Section 338, subdivision 4, and Section 339, subdivision 1, of the Code of Civil Procedure of the State of California;

(c) Because the alleged claim set forth in said Second Amended Complaint is barred by the laches of plaintiff in failing to use diligence in the prosecution of said claim and by the long delay in making defendant, as Executor, a party to this action, which lack of diligence and delay have been highly prejudicial to said defendant;

(d) Because there is a failure to include indispensable parties defendant as parties to the action, to wit, the subsidiaries of defendant Transamerica Corporation which are alleged to have suffered injury and detriment by the acts complained of;

(e) Because the court lacks jurisdiction and the Second Amended Complaint fails to state a claim against defendant upon which relief can be granted, for the reason that the Second Amended Complaint sets forth certain injury and damage to the subsidiaries of Transamerica Corporation and fails to allege that plaintiff was a stockholder of such subsidiaries, or any of them;

(f) Because the complaint consists entirely of sham, irrelevant, redundant and evasive allegations, and is not in compliance with the directions of the above court in granting to plaintiff permission to file a Second Amended Complaint, and fails to set [165] forth the undisputed facts that on December 9, 1931, the stockholders of Transamerica Corpora-

tion, including plaintiff, were sent a letter advising them that A. P. Giannini had received for his compensation the credits referred to in the Second Amended Complaint, and had withdrawn all but \$792,000.00 thereof, and that the Board of Directors of Transamerica upon advice of counsel had refused to pay defendant A. P. Giannini said balance; and that plaintiff had notice that thereafter, in February, 1932, A. P. Giannini was re-elected a director and officer of said corporation; and

(g) Because plaintiff has entirely disregarded the directions of this court at the time of the hearing of the motions herein directed at the First Amended Complaint with regard to setting up her causes of action in separate counts.

**MOTION FOR AN ORDER REQUIRING
PLAINTIFF TO SEPARATELY STATE
CAUSES OF ACTION IN SEPARATE
COUNTS**

II. For an order requiring plaintiff to state in separate counts the claims founded upon the following separate transactions:

First, the transaction, the gist of which appears in paragraphs XXVI to XXIX, inclusive, and in which, it is alleged, defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannini, deceased, were unjustly enriched to the serious and irremediable injury of defendant Transamerica and its corporate subsidiaries, departments, instrumentalities and shareholders, to the extent of at least \$3,700,000.00, alleged to have been paid to said

defendants on account of a salary agreement made between one Bancitaly Corporation and defendant Amadeo P. Giannini between April, 1929, and January, 1939.

Second, the transaction, the gist of which appears in paragraphs XXX to XXXIII, inclusive, and in which, it is alleged, defendant Walston & Co. and its individual members were unjustly [166] enriched in the years 1933 to 1938, inclusive, from the funds, moneys, assets and properties of defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, to the serious injury and detriment of Transamerica, its subsidiaries, departments and instrumentalities and shareholders in the sum and amount and to the extent of at least approximately \$548,000.00.

Third, the transaction, the gist of which appears in paragraphs XXXIV to XXXVI, inclusive, in respect to which it is alleged that during the year 1932 the sum of approximately \$1,500,000.00 was advanced by Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, for the purpose of the acquisition of Bankitaly Mortgage Company, and to said Bankitaly Mortgage Company the further sum of \$1,500,000.00 for use as capital, and that said Bankitaly Mortgage Company, later Pacific Coast Mortgage Company, indulged in certain speculative transactions which resulted in a profit of \$2,000,000.00 in the years 1933 to 1938, inclusive, by reason of which defendants were unjustly enriched to the serious and irremediable injury and detriment of defendant Transamerica Corporation, its corporate subsidi-

aries, departments, instrumentalities and shareholders in the amount of \$2,000,000.00.

Fourth, the transaction, the gist of which appears in paragraphs XXXVII and XXXVIII, in which it is alleged that Transamerica, its corporate subsidiaries, departments and instrumentalities, advanced to Charles J. Smith and Margaret Mallory, trustees, the sum of \$3,000,000.00 for speculative operations in the capital stock of Transamerica Corporation and in other stocks and securities, which transactions resulted in the years 1933 to 1936, inclusive, in a profit to said trust of \$300,000.00, and that defendants were unjustly enriched to the serious and irremediable injury and detriment of defendant Transamerica Corporation and its corporate subsidiaries, departments, instrumentalities and shareholders in the [167] amount of \$300,000.00.

Fifth, the transaction, the gist of which appears in paragraph XXXIX, in which it is alleged that in the years 1932 to 1937, inclusive, defendants caused Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, to incur items of expense aggregating \$2,250,000.00 and suffer losses in "stirring" and manipulating the market for stock of Transamerica Corporation, to the serious and irremediable injury and detriment of defendant Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders, in the amount of \$2,250,000.00.

This motion is made without prejudice to the motion heretofore made to dismiss the action, based

upon the same ground, and the motion hereinafter made to strike the complaint from the files on the same ground.

This motion is made upon the ground that the Second Amended Complaint unites and does not state in separate counts the several alleged claims founded upon separate alleged transactions or occurrences, in violation of the provisions of paragraph (b) of Rule 10 of the Federal Rules of Civil Procedure, and in violation of the directions of this court, given at the time permission was granted to the plaintiff to file an amended bill; that the defendants involved in the first alleged transaction are not the same as the defendants involved in the second, third, fourth or fifth transaction; that the defendants involved in the second, third, fourth and fifth transactions are different; that the plaintiff's alleged right to recover in behalf of Transamerica Corporation is based upon separate and distinct theories respecting each of said five alleged transactions; that plaintiff's alleged right to recover in behalf of Transamerica is based upon separate and distinct allegations with reference to each of said five alleged transactions; that said five alleged transactions are alleged to have occurred during different [168] times, and the officers and directors of Transamerica Corporation during the time of said alleged respective transactions were different; that a statement in separate counts of said five transactions will facilitate the clear presentation of the special defenses thereto of moving defendant, and that said separate statement is necessary in order

to permit defendant to assert his defense to said action.

MOTION FOR A MORE DEFINITE STATEMENT OR FOR A BILL OF PARTICULARS

III. For an order requiring plaintiff to make a more definite statement of or a bill of particulars in respect to the following matters, as to each of which defendant desires more definite particulars and in respect to each of which the Second Amended Complaint is defective:

A—Defects In Allegations Relating To Transamerica's Subsidiaries

A1. What facts constitute the basis of plaintiff's conclusion appearing in paragraph II of the Second Amended Complaint, that Bank of America National Trust & Savings Association, a national banking association, and the other corporations thereafter named are or were departments and instrumentalities of defendant Transamerica Corporation (p. 3, line 6 to p. 4, line 2).

A2. During what periods of time was the capital stock of the corporations referred to in said paragraph II as "subsidiaries, departments and instrumentalities" of defendant Transamerica Corporation, owned by defendant Transamerica Corporation, and what proportion of the stock of each was so owned by Transamerica Corporation.

A3. Which of the corporations referred to in paragraph XXVI and elsewhere in said Second Amended Complaint as "said corporation and its

corporate subsidiaries, departments and instrumen-
[169] talities” or by language of similar import
(hereinafter in this motion referred to as “said
corporations”), and if more than one to what ex-
tent each, was caused to acquire and absorb all of
the capital stock of Bancitaly Corporation, as al-
leged in paragraph XXVI of said Second Amended
Complaint (p. 17, line 26 to p. 18, line 1).

A4. How and by what means and in what man-
ner was said transaction accomplished, and who
were the “other persons” mentioned in said para-
graph XXVI from whom such stock was acquired
(p. 17, line 33).

A5. Which of said corporations, and if more
than one to what extent each, was caused to acquire
and absorb all of the assets of Bancitaly Corpora-
tion, as alleged in said paragraph XXVI (p. 17,
line 26 to p. 18, line 1).

A6. How and by what means and in what man-
ner was said transaction accomplished.

A7. Which of said corporations, and if more
than one to what extent each, was caused to appear
to assume as its own obligations the alleged pre-
tended, fraudulent and fictitious liabilities of said
Bancitaly Corporation, as alleged in said paragraph
XXVI (p. 17, line 26 to p. 18, line 17).

A8. Which of said corporations, and if more
than one to what extent each, was caused to make
and enter certain purported false, fraudulent and
fictitious credit entries, and upon the books of which
of said corporations were said entries made, as al-
leged in paragraph XXVII (p. 19, line 19 to p. 20,
line 6).

A9. Which of said corporations, and if more than one to what extent each, was caused to pay to defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannini, now deceased, sums as alleged in paragraph XXVIII of said Second Amended Complaint (p. 20, line 30 to p. 21, line 29).

A10. From the funds and assets of which of said [170] corporations, and if more than one the extent as to each, were defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannini, now deceased, unjustly enriched, and which of said corporations, and if more than one to what extent each, thereby suffered serious and irremediable injury and detriment, as alleged in paragraph XXVIII (p. 21, line 30 to p. 22, line 15).

A11. Upon the books of which of said corporations, and if more than one to what extent each, were the transactions complained of in paragraphs XXVI, XXVII and XXVIII concealed, as alleged in paragraph XXIX of said Second Amended Complaint (par. XXIX, p. 22, line 17 to p. 23, line 8).

A12. Which of said corporations, and if more than one to what extent each, was actively engaged in a profitable brokerage business when defendant Walston & Co. was formed, as alleged in paragraph XXX of said Second Amended Complaint (p. 23, lines 10-29).

A13. Which of said corporations' brokerage business, and if more than one to what extent the brokerage business of each, was diverted to Walston & Co., as alleged in paragraph XXXI of said Second Amended Complaint (p. 23, line 31 to p. 24, line 19).

A14. Which of said corporations, and if more than one to what extent each, was caused from time to time to disburse its funds and assets to Walston & Co., as alleged in paragraph XXXII of said Second Amended Complaint (p. 24, line 21 to p. 25, line 25).

A15. To which of said corporations did the business alleged to have been diverted to Walston & Co. belong, and if more than one the extent as to each, as alleged in paragraph XXXII (p. 24, line 21 to p. 25, line 25).

A16. From the funds, money, assets and properties of which of said corporations, and if more than one the extent as to each, were defendants unjustly enriched, as alleged in said paragraph XXXII (p. 24, line 21 to p. 25, line 25).

A17. Which of said corporations, and if more than one [171] to what extent each, was caused to pay and advance the sum of \$1,500,000.00 to the defendants to acquire a controlling interest in Bankitaly Mortgage Company, as alleged in paragraph XXXV of said Second Amended Complaint (p. 26, line 29 to p. 27, line 25).

A18. Which of said corporations, and if more than one to what extent each, was caused to pay and advance the sum of \$1,500,000.00 to Bankitaly Mortgage Company for speculative purposes, as alleged in said paragraph XXV (p. 26, line 29 to p. 27, line 25).

A19. To the extent that the same is not disclosed by the allegations of paragraphs XXII and XXIII of said Second Amended Complaint, what position did each defendant and each of the persons

referred to in paragraph XXXVI hold in said corporations, and if in more than one the positions in each (p. 28, lines 28-31).

A20. Which of said corporations, and if more than one to what extent each, suffered the serious and irremediable injury and detriment alleged in paragraph XXXVI (p. 29, lines 13-17).

A21. Which of said corporations, and if more than one to what extent each, was caused from time to time to pay and advance the sum of \$3,000,000.00 to the trustees mentioned in paragraph XXXVII of the Second Amended Complaint, as alleged in said paragraph (p. 29, line 19 to p. 30, line 4).

A22. To the extent that the same is not disclosed by the allegations of paragraphs XXII and XXIII of said Second Amended Complaint, what official positions did the defendants and persons referred to in paragraph XXXVIII of said Second Amended Complaint hold in said corporations, and if in more than one, the positions in each (p. 30, line 31 to p. 31, line 4).

A23. Which of said corporations, and if more than one to what extent each, suffered the serious and irremediable injury and detriment alleged in said paragraph XXXVIII (p. 31, lines 16-20).

A24. Which of said corporations, and if more than one [172] to what extent each, was caused to engage in the business of manipulating and "stirring" the market for capital stock of defendant Transamerica Corporation and doing the other acts complained of in paragraph XXXIX of said Second Amended Complaint, as alleged in said paragraph (p. 31, line 22 to p. 32, line 16).

A25. Which of said corporations, and if more than one to what extent each, suffered serious and irremediable injury and detriment by the expenditure of the sum of \$2,250,000.00, as alleged in paragraph XXXIX (p. 32, lines 12-16).

A26. Which of the items referred to in paragraph XL of said Second Amended Complaint were disguised, camouflaged, covered and concealed by entries on the books of which said corporations, and if more than one the extent as to each (p. 33, lines 11-15).

A27. Has plaintiff at any time been the owner of shares of stock of any of the corporations alleged in paragraph II of the Second Amended Complaint to be subsidiaries of defendant Transamerica Corporation and, if so, for what period did plaintiff own stock in each of said subsidiaries, and what was the number of shares of stock owned by plaintiff in each.

A28. To the extent that the same is not disclosed in paragraphs II, XXXIV and XXXVI, of what state is each of said corporations a resident.

B—Defects in allegations constituting the gist of the claims and consisting of conclusions of law or of the pleader.

B1. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXVI, that the matters complained of in said paragraph were "without legal right or authority" (p. 17, lines 28-29).

B2. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVI,

that the salary agreement therein referred to was "pretended, fraudulent and fictitious" [173] (p. 18, line 4).

B3. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVI, that the credit entries therein referred to were "pretended, fraudulent and fictitious" (P. 18, lines 11-12).

B4. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVI, that the profits of Bancitaly Corporation used as a basis of computation "were false, fictitious, unearned and unrealized" (p. 19, lines 9-13).

B5. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXVII, that the acts therein complained of were "without legal right or authority" (p. 19, lines 26-27).

B6. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVII, that the credit entries therein referred to were "purported, false, fraudulent and fictitious" (p. 19, line 29).

B7. What facts constitute the basis of plaintiff's conclusions appearing in said paragraph XXVII, that the total credit and each item thereof "was and is false, fraudulent, fictitious and untrue" and computed upon "false, fictitious, unearned and unrealized profits (p. 20, lines 13-19).

B8. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVIII, that defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannini, now

deceased, were “unjustly enriched” by the payments in said paragraph referred to (p. 22, line 2).

B9. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXVIII, that the alleged unjust enrichment was “to the serious and irremediable injury and detriment of said defendant corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders” (p. 22, [174] lines 2-5).

B10. What facts constitute the basis of plaintiff’s conclusion appearing in paragraph XXIX, that the corporate transactions and acts therein referred to were “wholly and entirely concealed” (p. 23, line 8).

B11. What facts constitute the basis of plaintiff’s conclusion appearing in paragraph XXXI, that the matters therein complained of were “without legal right or authority” (p. 24, line 4).

B12. What facts constitute the basis of plaintiff’s conclusion appearing in paragraph XXXII, that the matters therein complained of were done “without legal right or authority” (p. 24, lines 23-24).

B13. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXXII, that the defendants therein referred to were “unjustly enriched” (p. 25, line 20).

B14. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXXII, that said alleged unjust enrichment was “to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation,

its corporate subsidiaries, departments and instrumentalities'' (p. 25, lines 20-23).

B15. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXV, that the transaction therein complained of was "without legal right or authority" (p. 27, line 18).

B16. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXV, that the loans and advances therein referred to were not "open nor in the usual course of business" (p. 28, lines 9-10).

B17. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXVI, that the defendants therein mentioned and each of them was "unjustly enriched" (p. 29, line 11).

B18. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXVI, that said alleged [175] unjust enrichment was "to the serious and irremediable injury and detriment of defendant Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders" (p. 29, lines 13-16).

B19. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXVII, that the matter therein complained of was "without legal right or authority" (p. 29, line 22).

B20. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXVII, that the loans and advances therein referred to were not "open nor in the usual course of business" (p. 30, line 12).

B21. What facts constitute the basis of plain-

tiff's conclusion appearing in paragraph XXXVIII, that the defendants therein referred to were and each of them was "unjustly enriched" (p. 31, line 16).

B22. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXVIII, that said alleged unjust enrichment was "to the serious and irremediable injury and detriment of the defendant, Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders" (p. 31, lines 16-19).

B23. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXIX, that the matters in said paragraph complained of were done "without legal right or authority" (p. 31, line 30).

B24. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXIX, that the said matters were "to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders" (p. 32, lines 12-14). [176]

C. Defects in hypothetical and alternative allegations.

C1. Whether all the directors named as defendants and John M. Grant conspired and confederated, as alleged in paragraph XIX (p. 7, lines 14-22), or whether some of them were not conspirators but mere puppets, as alleged in paragraph XXIV (p. 16, line 32 to p. 17, line 4), or were neither conspirators nor puppets but merely failed

to discover the alleged wrongs, or having discovered the alleged wrongs failed to take action, as alleged in paragraph XXV (p. 17, lines 15-24).

C2. Which of the defendants and persons mentioned in said Second Amended Complaint were conspirators, which were puppets but not conspirators, which were neither conspirators nor uppets but failed to discover the alleged wrongful acts complained of, and which, being neither conspirators nor puppets, having discovered the alleged wrongful acts failed to take action, as alleged in paragraphs XIX, XXIV and XXV of the Second Amended Complaint.

D. Defects in allegations designed to excuse plaintiff's failure to make demand upon the Board of Directors of Transamerica to bring this action and to appeal to the stockholders of Transamerica.

D1. Upon what facts does plaintiff base her conclusion that an action to redress the alleged wrongs for which relief is sought in this action to be effective and complete must be directed against all of said defendants and persons named in the Second Amended Complaint, as alleged in paragraph LXII thereof (p. 36, lines 24-26).

D2. What facts constitute the basis of plaintiff's conclusion that a demand upon the Board of Directors of defendant Transamerica Corporation to bring this action would be and constitute a futile and idle act, as alleged in paragraph XLII of said Second [177] Amended Complaint (p. 36, lines 27-28).

D3. How and by what methods and by what means have the defendants and persons referred to in paragraphs XXI and XLIII of said Second Amended Complaint had and exercised complete and exclusive control of the voting shares of stock of defendant Transamerica Corporation, as alleged in said paragraphs of said Second Amended Complaint (p. 12, lines 14-25, and p. 36, line 30 to p. 37, line 2, respectively); if by stock ownership, how many shares did they hold, what was the period of time during which shares were held, and whether such control included the 57 shares alleged to be owned by plaintiff, and if through proxies, the period during which said proxies were held and by whom.

D4. Upon what facts does plaintiff base her conclusion that any demand upon the stockholders to be effective would first require an expensive and prolonged struggle with said adverse Boards of Directors and persons to wrest control of all the voting shares of stock of defendant Transamerica Corporation from them, as alleged in paragraph XLIII (p. 37, lines 17-20).

D5. Upon what facts does plaintiff base her conclusion that such a struggle would also be a futile and idle act, as alleged in paragraph XLIII (p. 37, lines 20-21).

E. Defects in allegations designed to avoid the bar of the statute of limitations.

E1. Who called plaintiff's attention on April 27, 1939, to the proceeding pending before the Securities and Exchange Commission and the order

of said Commission made therein on November 22, 1938, and released on November 25, 1938, as alleged in paragraph XLI of said Second Amended Complaint (p. 34, line 7 to p. 35, line 5); what was the relationship of said informant to plaintiff, and how long had such informant held such relationship to plaintiff.

E2. Why was plaintiff's attention not called to said order of November 22, 1938, earlier than April 27, 1939. [178]

E3. Why did plaintiff not learn of said order on November 25, 1938, when the same was released.

F. Defects in other allegations.

F1. What was the total amount of issued and outstanding shares of capital stock of Transamerica on the date of the commencement of this action as contrasted with the 57 shares owned by plaintiff, as set forth in paragraph III of the Second Amended Complaint (p. 4, lines 4-9).

F2. What were the pretended, fraudulent and fictitious liabilities of Bancitaly Corporation (other than the salary agreement) mentioned and referred to in paragraph XXVI of the Second Amended Complaint (p. 18, lines 1-3).

F3. Whether at the time defendants and persons mentioned in said paragraph XXVI caused Transamerica, its subsidiaries, departments and instrumentalities, to appear to assume as its own certain alleged pretended, fraudulent and fictitious liabilities of Bancitaly Corporation, including a certain alleged pretended, fraudulent and fictitious salary agreement, any of said defendants and per-

sons knew that said salary agreement was pretended or fraudulent or fictitious and, if so, which of said defendants and persons had such knowledge.

F4. To what extent were the credit entries referred to in paragraph XXVII (p. 20, lines 7-28) of said Second Amended Complaint in excess of the actual and true net profits of Bancitaly Corporation or Transamerica Corporation.

F5. Wherein did the amount credited to Amadeo P. Giannini, L. M. Giannini and Virgil Giannini, not truly and correctly represent five per cent of the actual and true net profits of said corporation and its corporate subsidiaries for said period, as alleged in paragraph XXVII (p. 20, lines 7-17) of said Second Amended Complaint, and wherein was the said salary computed upon false, fictitious, unearned and unrealized profits, and to what [179] extent was it so computed, as alleged in paragraph XXVII (p. 20, lines 17-20).

F6. To what extent, if any, did the amount of \$3,700,000.00 alleged to have been paid to defendant A. P. Giannini and others, alleged in paragraph XXVIII (p. 20, line 30 to p. 21, line 19), exceed 5% of the actual and true net profits of Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, as alleged in paragraph XXVII (p. 20, lines 7-28).

F7. Wherein the records and books of account kept and maintained by Transamerica Corporation were manipulated by an involved, intricate and complex system of accounting, as alleged in paragraph XXIX (p. 22, lines 24-27) of said Second Amended Complaint, and how the said sys-

tem of accounting was in conflict with the usual, customary, and proper and recognized principles of the science of accounting, and what were the false, misleading, untrue and fictitious names and designations under which payments and disbursements to defendant Amadeo P. Giannini, as alleged in said paragraph XXIX (p. 23, lines 3-8) were covered, disguised and concealed; and what was the knowledge and understanding of the plaintiff with respect to accounting.

F8. How and in what manner was the transfer and use of corporate funds and assets of defendant Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, disguised, camouflaged, covered and concealed on the books of Transamerica Corporation, its subsidiaries, departments and instrumentalities, and wherein were the records false, fictitious or misleading, as alleged in paragraph XL of said Second Amended Complaint (p. 33, lines 8-15).

The foregoing motion will be made upon the ground that the Second Amended Complaint lacks definiteness in the particulars specified and is defective in that regard, and that the details desired by defendant are necessary to enable him properly to prepare his responsive pleadings and to prepare for trial. [180]

MOTION TO STRIKE OUT THE ENTIRE SECOND AMENDED COMPLAINT

IV. For an order striking the entire Second Amended Complaint from the files for all of the rea-

sons set forth in subdivisions (f) and (g) of the foregoing Motion to Dismiss.

COSGROVE & O'NEIL

T. B. COSGROVE

F. J. O'NEIL

JOHN N. CRAMER

By JOHN N. CRAMER

Attorneys for Defendant Amadeo P. Giannini, Individually and in All of the Capacities in Which he is Sued

The address of said Attorneys for Amadeo P. Giannini is:

1031 Rowan Building

458 South Spring Street

Los Angeles, California

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq., Homer N. Boardman, Esq., and Joseph A. Ruskay, Esq., Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before this court (Honorable Harry A. Hollzer, District Judge), at court room No. 2, Post Office and Federal Courts Building, City of Los Angeles, California, on the 1st day of October, 1942, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

You Will Further Take Notice that all of said motions will be made upon the files and records herein, including the Reporter's Transcript of the

proceedings herein had on June 23, 24 and 25, 1942, said motions and this notice, and the affidavits relating respectively (1) to the delivery to counsel for plaintiff herein of [181] a copy of the letter of December 9, 1931, more particularly described in paragraph (f) of the foregoing Motion to Dismiss, and (2) to the mailing of said letter in December, 1931, which affidavits are annexed to the motions herein of defendants A. H. Giannini, et al., made in respect to the Second Amended Complaint.

Please Take Further Notice that defendant Amadeo P. Giannini will rely upon Points and Authorities in support of said motions, a copy of which is herewith served upon you.

COSGROVE & O'NEIL

T. B. COSGROVE

F. J. O'NEIL

JOHN N. CRAMER

By JOHN N. CRAMER

Attorneys for Defendant Amadeo P. Gannini, Individually and in All of the Capacities in Which he is Sued [182]

State of California,
County of Los Angeles—ss.

Ershal Murphy, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of 18 years and is not a party to the within and above entitled action; that affiant's business address is 1031 Rowan Building, 458 South Spring Street, Los Angeles, California;

that on the 15th day of September, A. D. 1942, affiant served the within "Motions by Defendant Amadeo P. Giannini, Individually and as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased, (1) To Dismiss the Action; (2) For an Order Requiring Plaintiff To Separately State Causes of Action in Separate Counts; (3) For a More Definite Statement or For Bill of Particulars, and (4) To Strike Out the Entire Second Amended Complaint" and "Notice of Motion" on the attorneys for plaintiff in said action by placing a true copy thereof in an envelope addressed to said attorneys at the business address of said attorneys as follows: Vincent A. Marco, Esq., Percy V. Clibborn, Esq., Homer N. Boardman, Esq., Joseph A. Ruskay, Esq., 9730 Wilshire Boulevard, Beverly Hills, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office as Los Angeles, California; that there is delivery service by United States mail at the place so addressed and there is regular communication by mail between the place of mailing and the place so addressed.

ERSHAL MURPHY

Subscribed and sworn to before me this 15th day of September, 1942.

[Notarial Seal] MARY IVES ANDERSON
Notary Public in and for said County of Los Angeles, State of California [183]

Receipt of a copy of the within is hereby admitted this . . . day of September, 1942.

VINCENT A. MARCO,
PERCY V. CLIBBORN,
HOMER N. BOARDMAN,
JOSEPH A. RUSKAY,

By
Attorneys for Plaintiff

[Endorsed]: Filed Sept. 15, 1942. [183-A]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANTS L. M. GIANNINI, INDIVIDUALLY AND AS AN ALLEGED PARTNER OF WALSTON & CO., GORDON GRAY, O. D. HAMLIN, T. W. HARRIS, A. P. JACOBS, F. G. STEVENOT, RUSS AVERY, P. A. BRICCA, GEORGE J. De MARTINI, W. N. LAGOMARSINO, A. J. SCAMPINI, CHESTER H. LOVELAND, AND THEODORE M. STUART,

- (1) TO DISMISS THE ACTION;
- (2) FOR AN ORDER REQUIRING PLAINTIFF SEPARATELY TO STATE CAUSES OF ACTION IN SEPARATE COUNTS;
- (3) FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS; AND
- (4) TO STRIKE OUT THE ENTIRE SECOND AMENDED COMPLAINT; AND

(5) TO STRIKE OUT DESIGNATED PORTIONS OF THE SECOND AMENDED COMPLAINT.

Defendants L. M. Giannini, Individually, And As An Alleged Partner of Walston & Co., Gordon Gray, O. D. Hamlin, T. W. Harris, A. P. Jacobs, F. G. Stevenot, Russ Avery, P. A. Bricca, George J. De Martini, W. N. Lagomarsino, A. J. Scampini, Chester H. Loveland, [184] and Theodore M. Stuart do, and each of them does move the Court as follows:

MOTION TO DISMISS

1. To dismiss the action:

1. Because the Second Amended Complaint fails to state a claim against these defendants, or any of them, upon which relief can be granted;

2. Because there is a lack of indispensable parties defendant, to wit: the subsidiaries of defendant Transamerica Corporation, which are alleged to have suffered injury and detriment by the acts complained of;

3. Because the alleged claim set forth in said Second Amended Complaint against these defendants, and particularly against defendants Theodore M. Stuart and L. M. Giannini, as an alleged partner of Walston & Co., is barred by the provisions of Section 338, subdivision 4, and Section 339, subdivision 1, of the Code of Civil Procedure of the State of California; and

4. Because the alleged claim set forth in said Second Amended Complaint against defendants, and particularly against defendants Theodore M. Stu-

art and L. M. Giannini, as an alleged partner of Walston & Co., is barred by the laches of plaintiff in failing to use diligence in the prosecution of said claim and particularly by the long delay in making the defendants Theodore M. Stuart and L. M. Giannini, as an alleged partner of Walston & Co., parties to this action in the original complaint, which lack of diligence and delay have been highly prejudicial to said defendants.

5. Because the court lacks jurisdiction for the reason that the Second Amended Complaint sets forth certain injury and damage to the subsidiaries of Transamerica Corporation, and fails to set forth that the plaintiff is, or ever was, a stockholder of such subsidiaries, or any of them.

6. Because the Second Amended Complaint consists entirely of sham, irrelevant, redundant and evasive allegations of specific [185] facts, and is not in compliance with the directions and conditions of the above entitled court in granting to plaintiff permission to file a second amended complaint.

7. Because the plaintiff has completely disregarded the direction of this court at the time of the hearing of the motions to dismiss the First Amended Complaint requiring the plaintiff to set up her several causes of action in separate counts, in order that the various defendants, whether directors or otherwise, could set forth their several, separate, defenses to such portions of the second amended complaint as specifically concerned them.

MOTION TO SEPARATELY STATE

II. For an order requiring plaintiff to state in separate counts the claims founded upon the following separate transactions:

First, the transactions relating to A. P. Giannini's compensation, the gist of which appears in paragraphs XXVI to XXIX, inclusive, of the Second Amended Complaint, and in which it is alleged that Transamerica, and its corporate subsidiaries, departments and instrumentalities assumed a certain contract for compensation for the personal services of A. P. Giannini, which contract was made between Bancitaly Corporation and A. P. Giannini, and in which it is alleged that certain fraudulent entries were made with regard to said contract, and illegal payments were made thereon by Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities.

Second, the transaction, the gist of which appears in paragraphs XXX to XXXIII, inclusive, and in which, it is alleged, defendant Walston & Co. and its individual members were unjustly enriched from the funds, moneys, assets and properties of defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, to their serious injury and detriment in the sum and amount and to the extent of at least approximately \$548,000.00. [186]

Third, the transaction, the gist of which appears in paragraphs XXXIV to XXXVI, inclusive, and in respect to which it is alleged that defendants and others received substantial sums as profits from speculations carried on through Bankitaly Mortgage

Company, later Pacific Coast Mortgage Company, and were unjustly enriched in the amount of said alleged profits to the serious and irremediable injury and detriment of Transamerica, its corporate subsidiaries, departments and instrumentalities, in the sum and to the extent of approximately \$2,000,000.00.

Fourth, the transaction, the gist of which appears in paragraphs XXXVII and XXVIII, inclusive, and in respect to which it is alleged that the defendants and other persons received substantial sums as profits from speculations carried on through a trust syndicate of which Charles J. Smith and Margaret Mallory are alleged to have been the trustees, and were unjustly enriched in the amount of said alleged profits to the serious and irremediable injury and detriment of Transamerica, its corporate subsidiaries, departments and instrumentalities, and shareholders in the amount and to the extent of at least approximately \$300,000.00.

Fifth, the transaction, the gist of which appears in paragraph XXXIX and in respect of which it is alleged that defendants and others caused Transamerica and its corporate subsidiaries, departments, and instrumentalities to engage in the business of manipulating and stirring the market for the capital stock of Transamerica by soliciting orders from the general public for the purchase of the capital stock of Transamerica, and that large items of expense were incurred and losses suffered to the detriment of Transamerica, its corporate subsidiaries, departments, instrumentalities, and shareholders in the sum of approximately \$2,250,000.00.

This motion is made upon the ground that the Second Amended Complaint unites and does not state in separate counts and several claims founded upon separate transactions or occurrences (1) in [187] violation of the provisions of paragraph (b) of Rule 10 of the Federal Rules of Civil Procedure, and (2) in violation of the directions of this court made on Tuesday, June 23, 1942 that plaintiff's alleged right to recover in behalf of defendant Transamerica Corporation is based upon separate and different theories in each of the three transactions that a statement in separate counts of said three transactions will facilitate the clear presentation of the matters set forth, and that such a separate statement will facilitate the presentation of the separate defenses thereto of these defendants and of each of them.

This motion is made without prejudice to the motion hereinabove made to dismiss the action, based upon some of the same grounds, and the motion hereinafter made to strike the second amended complaint from the files, based upon the same ground.

MOTION FOR A MORE DEFINITE STATEMENT OR FOR A BILL OF PARTICULARS

III. For an order requiring plaintiff to make a more definite statement of, or a bill of particulars in respect to, the following matters, as to each of which defendants desire more definite particulars and in respect to each of which the Second Amended Complaint is defective: [188]

(Items relating to Transamerica's subsidiaries)

1. Which of the corporations referred to in paragraph XXVI and elsewhere in said Second Amended Complaint as "said corporation and its corporate subsidiaries, departments and instrumentalities" or by language of similar import (hereinafter in this motion referred to as "said corporations"), and if more than one to what extent each, was caused to acquire and absorb all of the capital stock of Bancitaly Corporation, as alleged in paragraph XXVI of said Second Amended Complaint (p. 17, line 26 to p. 18, line 1).

2. How and by what means was said transaction accomplished.

3. Which of said corporations, and if more than one to what extent each, was caused to acquire and absorb all of the assets of Bancitaly Corporation, as alleged in said paragraph XXVI (p. 17, line 26 to p. 18, line 1).

4. Which of said corporations, and if more than one to what extent each, was caused to appear to assume as its own obligations the alleged pretended, fraudulent and fictitious liabilities of said Bancitaly Corporation, as alleged in said paragraph XXVI (p. 17, line 26 to p. 18, line 17).

5. Which of said corporations, and if more than one to what extent each, was caused to make and enter certain purported false, fraudulent and fictitious credit entries, and upon the books of which of said corporations were said entries made, as alleged in paragraph XXVII (p. 19, line 19 to p. 20, line 6).

6. Which of said corporations, and if more than

one to what extent each, was caused to pay to defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannini, now deceased, sums as alleged in paragraph XXVIII of said Second Amended Complaint (p. 20, line 30 to p. 21, line 29).

7. From the funds and assets of which of said corporations, and if more than one the extent as to each, were defendants, Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannini, [189] now deceased, unjustly enriched, and which of said corporations, and if more than one to what extent each, thereby suffered serious and irremediable injury and detriment, as alleged in paragraph XXVIII of said Second Amended Complaint (p. 21, line 30 to p. 22, line 15).

8. Upon the books of which of said corporations, and if more than one to what extent each, were the transactions complained of in paragraphs XXVI, XXVII concealed, as alleged in paragraph XXIX of said Second Amended Complaint (p. 22, line 17 to p. 23, line 8).

9. Which of said corporations, and if more than one to what extent each, was actively engaged in a profitable brokerage business when defendant Walston & Co. was formed, as alleged in paragraph XXX of said Second Amended Complaint (p. 23, lines 10-29).

10. Which of said corporations' brokerage business, and if more than one to what extent the brokerage business of each, was diverted to Walston & Co., as alleged in paragraph XXXI of said Second Amended Complaint (p. 23, line 31 to p. 24, line 19).

11. Which of said corporations, and if more than one to what extent each, was caused from time to time to disburse its funds and assets to Walston & Co., as alleged in paragraph XXXII of said Second Amended Complaint (p. 24, line 21 to p. 25, line 25).

12. To which of said corporations did the business alleged to have been diverted to Walston & Co. belong, and if more than one the extent as to each, as alleged in paragraph XXXII (p. 24, line 21 to p. 25, line 25).

13. From the funds, money, assets and properties of which of said corporations, and if more than one the extent as to each, were defendants unjustly enriched, as alleged in said paragraph XXXII (p. 24, line 21 to p. 25, line 25).

14. Which of said corporations, and if more than one to what extent each, was caused to pay and advance the sum of \$1,500,000.00, as alleged in paragraph XXXV of said Second Amended [190] Complaint (p. 26, line 29 to p. 27, line 25).

15. Which of said corporations, and if more than one to what extent each, suffered the alleged detriment resulting from the payments and advances alleged in paragraph XXXV of said Second Amended Complaint (p. 27, line 26 to p. 28, line 4).

16. To the extent that the same is not disclosed by the allegations of paragraphs XXII and XXIII of said Second Amended Complaint, what position did each defendant and each of the persons referred to in paragraph XXXVI hold in said corporations, and if in more than one the positions in each (p. 28, lines 18-31).

17. Which of said corporations, and if more

than one to what extent each, suffered the serious and irremediable injury and detriment alleged in paragraph XXXVI (p. 29, lines 13-17).

18. Which of said corporations, and if more than one to what extent each, was caused from time to time to pay and advance the sum of \$3,000,000.00 to the trustees mentioned in paragraph XXXVII of the Second Amended Complaint, as alleged in said paragraph (p. 29, line 19 to p. 30, line 4).

19. To the extent that the same is not disclosed by the allegations of paragraphs XXII and XXIII of said Second Amended Complaint, what official positions did the defendants and persons referred to in paragraph XXXVIII of said Second Amended Complaint hold in said corporations, and if in more than one, the positions in each (p. 30, line 31 to p. 31, line 4).

20. Which of said corporations, and if more than one to what extent each, suffered the serious and irremediable injury and detriment alleged in said paragraph XXXVIII (p. 31, lines 16-20).

21. Which of said corporations, and if more than one to what extent each, was caused to engage in the business of manipulating and steering the market for capital stock of defendant Transamerica Corporation and doing the other acts complained of in paragraph XXXIX of said Second Amended Complaint, as alleged in [191] said paragraph (p. 31, line 22 to p. 32, line 16).

22. Which of the items referred to in paragraph XL of said Second Amended Complaint were disguised, camouflaged, covered and concealed by entries on the books of which of said corporations, and

if more than one the extent as to each (p. 33, lines 11-15).

23. Has plaintiff at any time been the owner of shares of stock of any of the corporations alleged in paragraph II of the Second Amended Complaint to be subsidiaries of defendant Transamerica Corporation and, if so, for what period did plaintiff own stock in each of said subsidiaries, and what was the number of shares of stock owned by plaintiff in each.

(Items relating to plaintiff's excuse for her failure to make demand upon the directors and to appeal to the stockholders)

24. Upon what facts does plaintiff base her conclusion that an action to redress the alleged wrongs for which relief is sought in this action to be effective and complete must be directed against all of said defendants and persons named in the Second Amended Complaint, as alleged in paragraph XLII thereof (p. 36, lines 24-26).

25. What facts constitute the basis of plaintiff's conclusion that a demand upon the Board of Directors of defendant Transamerica Corporation to bring this action would be and constitute a futile and idle act, as alleged in paragraph XLII of said Second Amended Complaint (p. 36, lines 27-28).

26. How and by what methods and by what means have the defendants and persons referred to in paragraphs XXI and XLIII of said Second Amended Complaint had and exercised complete and exclusive control of the voting shares of stock of defendant Transamerica Corporation, as alleged

in said paragraphs of said Second Amended Complaint (p. 12, lines 14-25, and p. 36, line 30 to p. 37, [192] line 2, respectively); if by stock ownership, how many shares did they hold, what was the period of time during which shares were held, and whether such control included the 57 shares alleged to be owned by plaintiff, and if through proxies, the period during which said proxies were held and by whom.

27. Upon what facts does plaintiff base her conclusion that any demand upon the stockholders to be effective would first require an expensive and prolonged struggle with said adverse Boards of Directors and persons to wrest control of all the voting shares of stock of defendant Transamerica Corporation from them, as alleged in paragraph XLIII (p. 37, lines 17-20).

28. Upon what facts does plaintiff base her conclusion that such a struggle would also be a futile and idle act, as alleged in paragraph XLIII (p. 37, lines 20-21).

(Items relating to conclusions of law of the pleader)

29. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXVI, that the matters complained of in said paragraph were "without legal right or authority" (p. 17, lines 28-29).

30. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVI, that the salary agreement therein referred to was "pretended, fraudulent and fictitious" (p. 18, line 4).

31. What facts constitute the basis of plaintiff's

conclusion appearing in said paragraph XXVI, that the credit entries therein referred to were "pretended, fraudulent and fictitious" (p. 18, lines 11-12.)

32. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVI, that the profits of Bancitaly Corporation used as a basis of computation "were false, [193] fictitious, unearned and unrealized" (p. 19, lines 9-13).

33. - What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXVII, that the acts therein complained of were "without legal right or authority" (p. 19, lines 26-27).

34. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVII, that the credit entries therein referred to were "purported, false, fraudulent and fictitious" (p. 19, line 29).

35. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVII, that the total credit and each item thereof "was and is false, fraudulent, fictitious and untrue" (p. 20, lines 13-14).

36. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVIII, that certain defendants were "unjustly enriched" by the payments in said paragraph referred to (p. 21, line 30, to p. 22, line 2).

37. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVIII, that the alleged unjust enrichment was "to the serious and irremediable injury and detriment of said defendant corporation, and its corporate sub-

sidiaries, departments, instrumentalities and shareholders" (p. 22, lines 2-5).

38. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXIX, that the corporate transactions and acts therein referred to were "at all times covered, disguised, concealed and camouflaged" (p. 23, lines 3-4).

39. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXI, that the matters therein complained of were "without legal right or authority" (p. 24, line 4).

40. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXII, that the matters therein complained of were done "without legal right or authority" (p. 24, lines 23-24).

[194]

41. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXII, that the defendants therein referred to were "unjustly enriched" (p. 25, line 20).

42. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXII, that said alleged unjust enrichment was "to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities" (p. 25, lines 20-23).

43. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXV, that the transaction therein complained of was "without legal right or authority" (p. 27, line 18.)

44. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXV,

that the loans and advances therein referred to were not "in the usual course of business" (p. 28, lines 9-10).

45. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXVI, that the defendants therein mentioned and each of them was "unjustly enriched" (p. 29, line 11).

46. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXVI, that said alleged unjust enrichment was "to the serious and irremediable injury and detriment of defendant Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders" (p. 29, lines 13-16).

47. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXVII, that the matter therein complained of was "without legal right or authority" (p. 29, line 22; p. 30, line 24).

48. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXVIII, that the defendants therein referred to were and each of them was "unjustly enriched" (p. 31, line 16).

[195]

49. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXVIII, that said alleged unjust enrichment was "to the serious and irremediable injury and detriment of the defendant, Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders" (p. 31, lines 16-19).

50. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXIX, that the matters in said paragraph complained of were

done "without legal right or authority" (p. 31, line 30).

51. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXIX, that the said matters were "to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders" (p. 32, lines 12-14).

(Matters relating to the alleged discovery of the wrongs complained of)

52. Who called plaintiff's attention on April 27, 1939, to the proceeding pending before the Securities and Exchange Commission and the order of said Commission made therein on November 22, 1938, and released on November 25, 1938, as alleged in paragraph XLI of said Second Amended Complaint (p. 34, line 7 to p. 35, line 5); what was the relationship of said informant to plaintiff, and how long had such informant held such relationship to plaintiff.

53. Why was plaintiff's attention not called to said order of November 22, 1938, earlier than April 27, 1939.

54. Why did plaintiff not learn of said order on November 25, 1938, when the same was released.

(Items relating to the hypothetical and alternative allegations)

55. Whether, as alleged in paragraph XIX, all the defendants and all the persons named in paragraph XXIII of said Second Amended [196] Com-

plaint conspired and agreed one with the other as in paragraph XIX alleged, or whether some of them were not conspirators but mere puppets, or were neither conspirators nor puppets but merely failed to discover the alleged wrongs, or having discovered the alleged wrongs failed to take action, as alleged in paragraphs XXIV and XXV of said Second Amended Complaint (p. 14, line 31, to p. 17, line 24).

56. Which of the defendants and persons mentioned in said Second Amended Complaint were conspirators, which were puppets but not conspirators, which were neither conspirators nor puppets but failed to discover the alleged wrongful acts complained of, and which, being neither conspirators nor puppets, having discovered the alleged wrongful acts failed to take action, as alleged in paragraphs XIX, XXIV and XXV of the Second Amended Complaint (p. 17, lines 15-24).

The foregoing motion will be made on the ground that the Second Amended Complaint lacks definiteness in the particulars specified, and is defective in that regard, and that the details desired by the defendants joining in this motion, and each of them, are necessary to enable them and each of them properly to prepare their respective pleadings and to prepare for trial.

MOTION TO STRIKE OUT THE ENTIRE SECOND AMENDED COMPLAINT

IV. For an order striking the entire Second Amended Complaint from the files, for all the rea-

sons set forth in subdivisions 6 and 7 of the foregoing Motion to Dismiss.

MOTION TO STRIKE OUT DESIGNATED
PORTIONS OF THE SECOND AMENDED
COMPLAINT

V. In the alternative, and without prejudice to the foregoing motion to strike out the entire Second Amended Complaint, for [197] an order striking the following matters from the Second Amended Complaint:

1. All of paragraphs XXVI, XXVII, XXVIII, XXIX of the Second Amended Complaint, in which are set forth transactions by and with Bancitaly Corporation and showing credits entered and payments made on account of salary or compensation to A. P. Giannini for services rendered.

The foregoing motion will be made upon the ground that the matters above specified are redundant, immaterial and impertinent as to these defendants, and are barred by the statute of limitations of actions of the State of California, and by the laches of plaintiff.

Respectfully submitted,

RUSS AVERY and

GORDON GRAY,

By RUSS AVERY,

Attorneys for said defendants

L. M. Giannini, individually, and as an alleged partner of Walston & Co., Gordon Gray, O. D. Hamlin, T. W. Harris, A. P. Jacobs, F. G. Stevenot, Russ Avery, P. A. Bricca, George J. DeMartini,

W. N. Lagomarsino, A. J. Scampini, Chester H. Loveland, and Theodore M. Stuart.

RUSS AVERY,

In Pro per

604 Homer Laughlin Building

315 South Broadway,

Los Angeles, California.

GORDON GRAY,

In Pro per

Bank of America Building,

San Diego, California.

By RUSS AVERY. [198]

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq., Homer N. Boardman, Esq., and Joseph A. Ruskay, Esq., Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before this court (Honorable Harry A. Hollzer, District Judge), at court room No. 2, Post Office and Federal Courts Building, City of Los Angeles, California, on the 1st day of October, 1942, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

You Will Further Take Notice that all of said motions will be made upon the files and records herein, including the Reporter's Transcript of the proceedings herein had on June 23, 24 and 25, 1942, said motions and this notice, and the affidavits relating respectively (1) to the delivery to counsel for plaintiff herein of a copy of the letter of December

9, 1931, and (2) to the mailing of said letter in December, 1931, which affidavits are annexed to the motions herein of defendants A. H. Giannini, et al., made in respect to the Second Amended Complaint.

Please Take Further Notice that defendants L. M. Giannini, individually and as an alleged partner of Walston & Co., Gordon Gray, O. D. Hamlin, T. W. Harris, A. P. Jacobs, F. G. Stevenot, Russ Avery, P. A. Bricca, George J. De Martini, W. N. Lagomarsino, A. J. Scampini, Chester H. Loveland, and Theodore M. Stuart will rely upon Points and Authorities in support of said motions, a copy of which is herewith served upon you.

RUSS AVERY and GORDON
GRAY

By RUSS AVERY

Attorneys for said defendants L. M. Giannini, Individually and as an alleged partner of Walston & Co., Gordon Gray, O. D. Hamlin, T. W. Harris, A. P. Jacobs, F. G. Stevenot, Russ Avery, P. A. Bricca, George J. DeMartini, W. N. Lagomarsino, A. J. Scampini, Chester H. Loveland, and Theodore M. Stuart. [199]

RUSS AVERY

In Pro Per

604 Homer Laughlin Building,
315 South Broadway
Los Angeles, California.

GORDON GRAY

In Pro Per

Bank of America Building,
San Diego, California.

By RUSS AVERY [200]

Affidavit of Service by Mail—1013A, C. C. P.

State of California,

County of Los Angeles—ss.

Irene S. McAllister, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 315 South Broadway, Los Angeles, California. That on the 15th day of September, A.D., 1942, affiant served the within Motions by Defendants L. M. Giannini, et al. on the Plaintiff in said action, by placing a true copy thereof in an envelope addressed to Messrs. Vincent Anthony Marco, Homer N. Boardman, Percy V. Clibborn and Jos. A. Ruskay, at the business address of said Plaintiff's attorneys as follows: 9730 Wilshire Blvd., Beverly Hills, Cal. and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. That there is delivery service by United States mail at the place so addressed, there is a regular communication by mail between the place of mailing and the place so addressed.

IRENE S. McALLISTER

Subscribed and Sworn to before me this 15th day of September, 1942.

[Seal]

ELIZABETH SPRAGINS

Notary Public in and for said
County and State.

[Endorsed]: Filed Sep. 15, 1942. [201]

[Title of District Court and Cause.]

MOTION OF DEFENDANT BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, deceased,

- (1) TO DISMISS THE ACTION:
- (2) TO REQUIRE PLAINTIFF TO STATE SEPARATELY HER SEVERAL CAUSES OF ACTION; AND
- (3) FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS.

The defendant, Bank of America National Trust & Savings Association, as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, deceased, moves the court as follows:

MOTION TO DISMISS

I. To dismiss the action because the Second Amended Complaint and each cause of action therein attempted to be stated fails to state a claim against this moving defendant upon which relief can be granted. Said motion is based upon the following grounds:

(1) The complaint is generally insufficient to charge the defendants with any wrongful act or omission, all the allegations [202] in that behalf being the pleader's conclusions.

(2) The complaint fails to show that any claim has been filed with the defendant Bank of America

National Trust & Savings Association, as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, deceased.

(3) The complaint fails to show any demand upon the directors or the stockholders to maintain this action or any valid excuse for failure to make such demand.

(4) The claims set forth in the Second Amended Complaint against this moving defendant are barred by the laches of the plaintiff in failing to use due diligence in the commencement and prosecution of this action, which lack of diligence is prejudicial to this moving defendant.

(5) There is a failure to include as parties defendant or parties plaintiff persons who are indispensable parties to this action in that subsidiaries of the defendant Transamerica Corporation which are alleged to have suffered injury and detriment by reason of matters set forth in the Second Amended Complaint are not named as parties herein.

(6) The court lacks jurisdiction of the subject matter of this action for the reason that the Second Amended Complaint sets forth certain injuries and damages to subsidiaries of Transamerica Corporation and fails to set forth that the plaintiff was a stockholder of such subsidiaries, or any of them.

(7) The complaint consists entirely of sham, irrelevant, redundant and evasive allegations, and is not in compliance with the directions of the court in granting plaintiff permission to file a Second Amended Complaint.

(8) The plaintiff has wholly disregarded the directions of the court given at the hearing of the motions to dismiss the First Amended Complaint whereby plaintiff was required to state her causes of action separately. [203]

**MOTION TO REQUIRE PLAINTIFF TO
STATE SEPARATELY HER SEVERAL
CAUSES OF ACTION.**

II. For an order requiring plaintiff to state in separate counts the claims stated upon the following separate transactions:

(1) The transactions set forth in Paragraphs XXVI, XXVII and XXIX of said Second Amended Complaint in which it is alleged that Transamerica Corporation, its corporate subsidiaries, departments, and instrumentalities assumed a certain contract for compensation for the personal services of A. P. Giannini, which contract was made between A. P. Giannini and Bancitaly Corporation, and it is alleged that certain fraudulent entries were made with regard to said contract, and illegal payments made thereon by Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities. These transactions may be summarized as those relating to A. P. Giannini's compensation.

(2) The transactions the gist of which appears in Paragraphs XXX, XXXI, XXXII and XXXIII of the Second Amended Complaint, and in which it is alleged that on or about the 17th day of December, 1932, Amadeo P. Giannini and others

caused the organization of the firm of Walston & Co., and that during the years 1932 to 1938, inclusive, they caused funds and assets of Transamerica Corporation, its corporate subsidiaries, departments, and instrumentalities, to be transferred to said partnership, and furnished to Walston & Co. for use as capital the sum of \$548,000.00, to the detriment of Transamerica Corporation, its corporate subsidiaries, departments, and instrumentalities, in said amount.

(3) The transactions the gist of which appears in Paragraphs XXXIV to XXXVI, inclusive, in respect to which it is alleged that during said year 1932 certain funds not less than the sum of \$1,500,000.00 were advanced by Transamerica Corporation, its corporate subsidiaries, departments, and instrumentalities, to the [204] defendants, for the purpose of the acquisition of Bancitaly Mortgage Company, and that thereafter, Bancitaly Mortgage Company indulged in certain speculative transactions which resulted in a profit of \$2,000,000.00.

(4) The transactions the gist of which appears in Paragraphs XXXVII and XXXVIII in which it is alleged that Transamerica Corporation, its corporate subsidiaries, departments, and instrumentalities, advanced to Charles J. Smith and Margaret Mallory, Trustees, the sum of \$3,000,000.00 for speculative operations in the Capital stock of Transamerica Corporation, which said transactions resulted in a profit to said trust of \$3,000,000.00.

(5) The transaction the gist of which appears in Paragraph XXXIX, in which it is alleged that

in the years 1932 to 1937, inclusive, the defendants caused Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, to incur large items of expense and suffer losses with regard to the purchase of the capital stock of the defendant Transamerica Corporation, which caused injury and detriment to Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders, in the sum of not less than \$2,250,000.00.

This motion is made without prejudice to the motion heretofore made to dismiss the action based upon the same grounds.

This motion is also made upon the ground that the Second Amended Complaint unites and does not state in separate counts the several alleged claims founded upon separate alleged transactions or occurrences, in violation of the provisions of paragraph (b) of Rule 10 of the Federal Rules of Civil Procedure, and in violation of the directions of this Court, given at the time permission was granted to the plaintiff to file an amended bill. [205]

MOTION FOR A MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

III. For an order requiring plaintiff to make a more definite statement of, or a bill of particulars, in respect to the following matters as to each of which defendant desires more definite particulars and in respect to each of which the Seconded Amended Complaint is defective:

(1) What was the number of shares of capital stock of defendant Transamerica Corporation on the date of the commencement of this action?

(2) Which of the corporations mentioned in Paragraph II were subsidiaries of Transamerica Corporation, which were departments, and which were instrumentalities, and what fractional part of stock of each of said corporations was owned by Transamerica Corporation?

(3) How or by what means the conspiring defendants would or could obtained or maintain control of the voting share of Transamerica Corporation as alleged in Paragraph XIX(a)?

(4) How or by what means the conspiring defendants would or could dominate the individual members of the Board of Directors as alleged in Paragraph XIX (a), it not being alleged that any of the defendants was a director in the year 1928, except Amadeo P. Giannini, James C. Bacigalupi, and P. C. Hale, and it not appearing that such persons constituted a majority of the Board of Directors or owned a majority of the stock of Transamerica Corporation?

(5) How or by what means the majority of members of the Board of Directors would or should or could be elected from the membership of the conspiracy, as alleged in Paragraph XIX (b)?

(6) How or by what means the non-conspiring directors should or could be made puppets, dummies, or alter egos for the conspirators, it appearing that they were not directors in October, [206] 1928,

when the conspiracy was formed, or as to a large number of them, until the year 1932?

(7) How or in what amount Transamerica Corporation was injured by the manipulation of its stock upon the Securities Exchange by the conspirators, or how any dealing by the conspirators in the stock of the corporation could injure it, as alleged in Paragraph XIX (e)?

(8) What brokerage business of Transamerica Corporation was to be diverted to other corporations alleged by the conspirators or by what means or how such diversion would injure Transamerica Corporation?

(9) How or in what manner the conspiracy to the effect that non-conspiring directors would remain absent from the meetings of the Board of Directors did, or could, injure Transamerica Corporation, it appearing from the complaint that many of the directors who because such after October 11, 1928, were not directors at that time, it appearing by the allegations of Paragraph XXV that some of the directors were not members of the conspiracy?

(10) How or by what means the act of the conspiring defendants were to be concealed or disguised from the other shareholders or directors, or in what respect the records were to be untrue, as alleged in Paragraph XIX (h)?

(11) In what manner and in what respect the records of Transamerica Corporation were untrue or false or camouflaged, and what misleading names, designations, and acts were employed by the conspirators as alleged in Paragraph XIX (h)?

(12) Whether the parties to the conspiracy who were directors when the conspiracy was formed on October 11, 1928, did thereafter continue in control or whether they lost control, and when, and whether if having lost control they ever regained control of the Board of Directors, and when? [207]

(13) By what means the "said defendants and persons procured, obtained, had, held, and exercised" full control of the outstanding shares of the stock of the Transamerica Corporation as alleged in Paragraph XXI, it not being alleged they owned a controlling stock interest?

(14) Whether the defendants or the other persons mentioned in Paragraph XXI controlled the stock of Transamerica Corporation or to what extent the defendants controlled and to what extent the other persons controlled?

(15) How and by what means the non-conspiring members of the Board of Directors were wholly and completely controlled, directed, and nominated by the defendant directors, as alleged in Paragraph XXIV?

(16) Whether the non-conspiring directors failed to discover the wrongful acts complained of or discovered such acts and failed to take action, as alleged in Paragraph XXV?

(17) Why or how or by reason of what facts the action of the defendants and the other persons in causing Transamerica Corporation to acquire the capital assets of Bankitaly Corporation and assume its obligations was without legal right or authority, as alleged in Paragraph XXIV?

(18) How or why or in what respect the salary agreement between Amadeo P. Giannini and Bankitaly Corporation was fraudulent or fictitious, as alleged in Paragraph XXIV?

(19) How or in what respect the credit entry pursuant to the salary agreement was fictitious or fraudulent or in what respect the names and designations used in connection therewith were false or fictitious?

(20) How or in what respect or by reason of what fact the liability of Bankitaly Corporation evidenced by the salary agreement was fraudulent or fictitious? [208]

(21) Why the plaintiff is unable to make a more definite or certain statement with respect to the matters above mentioned in Paragraph XXVII than are made by the plaintiff?

(22) What were the actual net profits of Transamerica Corporation and its subsidiaries and in what manner and to what extent the credits represented false, fictitious, unearned, and unrealized profits?

(23) How or in what manner Transamerica Corporation was injured in the amount of \$3,700,000.00, it being alleged that is the amount paid to the Gianninis, and it not being shown to what extent that amount was false or fictitious, nor that the services of Amadeo P. Giannini were not worth that sum?

(24) How or in what manner the entries in the books of Transamerica Corporation, as alleged in

Paragraph XXIX were covered, disguised, concealed, and camouflaged, or in what respect the entries were false, fictitious, misleading and untrue?

(25) Whether Transamerica Corporation or its subsidiaries, departments, or instrumentalities owned the investment, security, and brokerage business referred to in Paragraph XX?

(26) What, if anything, was the value of said business?

(27) How or in what manner the formation of the copartnership of Walston & Co. did or could unjustly enrich Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman, and Virgil D. Giannini, to the detriment of Transamerica Corporation, its subsidiaries, and shareholders?

(28) How or by what means the defendants herein did or could cause the co-partnership of Walston & Co. to be formed, it not appearing from the complaint that all of the partners were ever members of the Board of Directors of Transamerica Corporation or members of the conspiracy attempted to be alleged in the complaint? [209]

(29) Whether the security and brokerage business alleged to have been engaged in by Transamerica Corporation and its subsidiaries was a business for themselves or for the public?

(30) When or in what manner the defendants caused Transamerica Corporation and its subsidiaries "to transfer and divert all of the said investment, security, and brokerage business thereof" to Walston & Co., it appearing from the complaint

that such acts were done in the years 1933, 1934, 1935, 1936, 1937, and 1938, and it not appearing what part of the business was transferred in any of the said years, but it appearing from the allegations of Paragraph XXI that during the said years Transamerica Corporation and its subsidiaries entrusted certain brokerage orders and business to Walston & Co., for execution, and there being no allegation that Walston & Co. did not perform the said business, execute said orders, and render brokerage service worth all that was paid?

(31) By reason of what fact the transfer and diversion of the business to Walston & Co., "was without legal right or authority" as alleged in Paragraph XXXI?

(32) How or by reason of what fact the brokerage business referred to in Paragraph XXXII "belonged to defendant Transamerica Corporation and its subsidiaries", it appearing from the allegations of Paragraph XXXII merely that Transamerica Corporation and its subsidiaries entrusted brokerage business to Walston & Co. by way of commission to buy or sell, and paid compensation to Walston & Co. for the performances of such service?

(33) How or in what manner Walston & Co. was unjustly enriched or Transamerica Corporation and its subsidiaries injured by the transactions alleged in Paragraph XXXII, and by reason of what facts such enrichment was unjust?

(34) How or in what manner the earnings and

profits of the brokerage partnership of Walston & Co., were withheld from the re- [210] cords of Transamerica Corporation and its subsidiaries, or why such earnings should have been included in their records, or how or by reason of what fact Transamerica Corporation and its subsidiaries were concerned with the earnings and profits of the brokerage firm of Walston & Co., it being alleged only that Transamerica Corporation and its subsidiaries entrusted brokerage business to Walston & Co. and paid compensation for performance thereof?

(35) How or by what means the defendants formed or organized the private trust referred to in Paragraph XXXIV, or could have done so, and by reason of what writing or other agreement the defendants and other persons named in the complaint were beneficiaries?

(36) How or in what respect the payment and advance of funds and assets of Transamerica Corporation and its subsidiaries to the trust was "without legal right or authority"?

(37) How or in what respect Transamerica Corporation was injured by the operations of the said trust referred to in Paragraph XXXIV?

(38) How or in what manner any of the matters alleged in Paragraph XXXV with respect to the acquisitions of the stock of Bankitaly Mortgage Company and speculative operations of the defendants injured Transamerica Corporation?

(39) How or in what manner the change of name of Bankitaly Mortgage Company to Pacific

Coast Mortgage Company concealed the nature and extent of the defendants' interests in the said company?

(40) How or in what manner Transamerica Corporation was injured by the speculative operations in the capital stock of Transamerica Corporation as alleged in Paragraph XXXVI?

(41) How or by what fact or reason the payment and advance of funds to Charles J. Smith and Margaret Mallory as alleged in Paragraph XXXVII was without legal right or authority?

[211]

(42) How or in what manner Transamerica Corporation was injured by any of the matters alleged in Paragraph XXXVII?

(43) How or by reason of what fact Transamerica Corporation was entitled to any of the profits of Charles J. Smith and Margaret Mallory referred to in Paragraph XXXVIII?

(44) Why or by reason of what fact the manipulations by Transamerica Corporation and its subsidiaries of the capital stock of Transamerica Corporation "and creating a demand therefor by soliciting orders from the general public" for the purchase of Transamerica Corporation stock was "without legal right or authority", it appearing from the general allegations of the complaint that Transamerica Corporation was a corporation of large capitalization with wide spread stock ownership numbering approximately 200,000 stockholders, and it being presumed to be to the benefit of its stockholders to maintain a market for the stock?

(45) How or in what manner the manipulations of the stock and the solicitation of orders from the public was to the detriment of Transamerica Corporation and its shareholders, or why or in what manner it enhanced the personal, private, and individual interests of the defendants as alleged in Paragraph XXXIX?

(46) Whether all of the matters referred to in Paragraph XL were "withheld from the corporation records or books of account" of Transamerica Corporation, or whether "each item was upon the corporation records of the said defendant corporation and its corporate subsidiaries, departments, and instrumentalities, disguised, camouflaged, covered, and concealed", and if the latter, by what means and in what manner were such entries disguised, camouflaged, covered, and concealed, and in what manner were the records of said corporation "false, fictitious, and misleading" as alleged in paragraph XL. [212]

(47) Whether any of the 200,000 stockholders of Transamerica Corporation, other than the plaintiff and the defendants herein and the alleged conspirators, were ignorant of the matters alleged in the complaint during the time plaintiff alleges she was ignorant of such facts, and when other stockholders became aware of the facts alleged in the complaint or of the facts sufficient to arouse suspicion and inquiry about the matters alleged in the complaint?

(48) How and under what circumstances the plaintiff learned on or about April 27, 1939, that

the proceeding was pending to suspend Transamerica Corporation from its registration on stock exchanges, it being alleged that the Securities and Exchange Commission had ordered a hearing on November 22, 1938, and publicly announced that fact on November 25, 1938, and why plaintiff did not and could not have earlier discovered that fact?

GEORGE D. SCHILLING

G. L. BERREY

Attorneys for defendant Bank of America National Trust & Savings Association, as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, deceased.

The address of said attorneys is:

410 Bank of America Building,
Los Angeles, California,
TRinity 4353 [213]

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq., Homer N. Boardman, Esq., and Joseph A. Rus-kay, Esq., Attorneys for Plaintiff, and to Plain-tiff Herein:

You, And Each Of You, will please take notice that the undersigned will bring the within and fore-going motions on for hearing before this Court Honorable Harry A. Hollzer, District Judge, at Court Room No. 2, Post Office and Court House Building, Los Angeles, California, on the 1st day of October, 1942, at 10:00 o'clock a. m., or as soon thereafter as counsel can be heard.

You Will Further Take Notice that all of said motions will be made upon the files and records herein, including the second amended complaint, said motions and this notice, and the affidavits of Edmund Nelson and Hector Compana served and filed with the motions of the defendants A. H. Giannini, and others, to dismiss the action.

Please Take Further Notice that the defendant Bank of America National Trust & Savings Association, as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, deceased, will rely upon points and authorities in support of said motions, a copy of which is herewith served upon you.

Dated this 15th day of September, 1942.

GEORGE D. SCHILLING

G. L. BERREY

By G. L. BERREY

Attorneys for Bank of America National Trust & Savings Association, as Administrator-With-The-Will-Annexed of the Estate of John M. Grant, 410 Bank of America Building, Los Angeles, California, TRinity 4353. [214]

AFFIDAVIT OF MAILING

State of California

County of Los Angeles—ss.

Gertrude Mosher on oath says: I am a citizen of the United States and a resident of said county. I am over the age of eighteen years and not a party to the above entitled action. My business address is 650 South Spring Street, Los Angeles, California.

On the 15th day of September, 1942, I served the attached Motion to dismiss, etc. and notice thereof on Vincent A. Marco, one of the attorney(s) for plaintiff in said action by putting a true copy thereof enclosed in a sealed envelope, addressed to said attorney(s) at his business address at: 9730 Wilshire Boulevard, Beverly Hills, California, in the post office at Los Angeles, California, with postage thereon fully prepaid. There is regular communication by mail between the place of mailing and the place so addressed.

GERTRUDE MOSHER

Subscribed and sworn to before me this 15th day of Sept., 1942.

[Seal]

CLARA KLEINMAN

Notary Public in and for said county and state.

[Endorsed]: Filed Sep. 15, 1942. [215]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANTS A. H. GIANNINI, WILLIAM E. BLAUER, LEON BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F. MORRISH, A. J. MOUNT, ALFRED E. SBARBORO, JAMES A. BACIGALUPI, GEORGE A. WEBSTER, C. R. BELL, W. W. GARTHWAITE AND LOUIS FERRARI, JOINTLY AND SEVERALLY:

- I. TO DISMISS THE ACTION;
- II. TO SEPARATELY STATE THE SEVERAL CAUSES OF ACTION IN SEPARATE COUNTS, SAID MOTION BEING WITHOUT PREJUDICE TO MOTIONS TO DISMISS AND TO STRIKE, BASED ON SAME GROUND;
- III. FOR A MORE DEFINITE STATEMENT AND BILL OF PARTICULARS;
- IV. TO STRIKE OUT THE ENTIRE SECOND AMENDED COMPLAINT; AND
- V. TO STRIKE OUT DESIGNATED PORTIONS OF THE SECOND AMENDED COMPLAINT. [216]

Defendants A. H. Giannini, William E. Blauer, Leon Bocqueraz, E. H. Clark, Charles N. Hawkins, W. F. Morrish, A. J. Mount, Alfred E. Sbarboro, James A. Bacigalupi, George A. Webster, C. R.

Bell, W. W. Garthwaite and Louis Ferrari, jointly, and each severally, move the Court as follows:

MOTION TO DISMISS.

I. To dismiss the above entitled action,

(a) because the Second Amended Complaint fails to state a claim against the said defendants jointly, or against any one or more of them jointly with others, or against any of said defendants severally, upon which relief can be granted;

(b) because the alleged claim set forth in said Second Amended Complaint against these defendants, jointly and severally, is barred by the provisions of Section 338, subdivision 4, Section 339, subdivision 1, and Section 343, of the Code of Civil Procedure;

(c) because the alleged claim set forth in said Second Amended Complaint against these defendants, jointly and severally, is barred by the laches of said plaintiff in failing to use due diligence in the prosecution of said claim, and by the long delay in filing this action, which lack of diligence and delay have been highly prejudicial to these defendants; and because, as to certain of the defendants joining in this motion, the plaintiff has been guilty of gross laches and prejudicial delay in not sooner making said defendants parties to this action;

(d) because there is a failure to include indispensable parties defendant as parties to the Second Amended Complaint, in that the subsidiaries of the defendant Transamerica Corporation which are alleged to have suffered injury and detriment by rea-

son [217] of the matters set forth in said Second Amended Complaint are not named parties therein;

(e) because the Court lacks jurisdiction for the reason that the Second Amended Complaint sets forth certain injury and damage to the subsidiaries of Transamerica, and fails to set forth that the plaintiff was a stockholder of such subsidiaries, or any of them;

(f) because the complaint consists entirely of sham, irrelevant, redundant and evasive allegations, and is not in compliance with the directions of the above Court in granting to plaintiff permission to file a Second Amended Complaint, and fails to set forth the undisputed facts that on December 9, 1931 the stockholders of Transamerica Corporation, including plaintiff, were sent a letter advising them that A. P. Giannini had received for his compensation the credits referred to in the Second Amended Complaint, and had withdrawn all but \$792,000.00 thereof, and that plaintiff had notice that thereafter, in February, 1932, A. P. Giannini was re-elected a director and officer of said corporation;

(g) because the said plaintiff has entirely disregarded the directions of this Court at the time of the hearing of the motions to dismiss the First Amended Complaint, with regard to setting up his causes of action in separate counts, so that defendants who were directors of the corporation, or otherwise participated in the transactions complained of, could set forth their defenses to such portions of the complaint as concern them, and would not be

called upon to answer or defend against charges made against other defendants with regard to transactions with which they were in nowise concerned.

[218]

MOTION TO SEPARATELY STATE THE SEVERAL CAUSES OF ACTION IN SEPARATE COUNTS.

II. For an order requiring plaintiff to state in separate counts the claims founded upon the following separate transactions:

First: The transactions set forth in paragraphs XXVI, XXVII, XXVIII and XXIX of said Second Amended Complaint in which it is alleged that Transamerica, its corporate subsidiaries, departments and instrumentalities assumed a certain contract for compensation for the personal services of A. P. Giannini, which contract was made between A. P. Giannini and Bancitaly Corporation, and it is alleged that certain fraudulent entries were made with regard to said contract, and illegal payments made thereon by Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities. These transactions may be summarized as those relating to A. P. Giannini's compensation.

Second: The transactions the gist of which appears in paragraphs XXX, XXXI, XXXII and XXXIII of the Second Amended Complaint, and in which it is alleged that on or about the 17th day of December, 1932, Amadeo P. Giannini and others caused the organization of the firm of Walston & Co., and that during the years 1932 to 1938,

inclusive, they caused funds and assets of Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, to be transferred to said partnership, and furnished to Walston & Co. for use as capital the sum of \$548,000.00, to the detriment of Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, in said amount.

Third: The transactions the gist of which appears in paragraphs XXXIV to XXXVI, inclusive, in respect to which it is alleged that during said year 1932 certain funds not less than the [219] sum of \$1,500,000.00 were advanced by Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, to the defendants, for the purpose of the acquisition of Bancitaly Mortgage Company, and that thereafter Bancitaly Mortgage Company indulged in certain speculative transactions which resulted in a profit of \$2,000,000.00.

Fourth: The transactions the gist of which appears in paragraphs XXXVII to XXXVIII, inclusive, in which it is alleged that Transamerica, its corporate subsidiaries, departments and instrumentalities, advanced to Charles J. Smith and Margaret Mallory, Trustees, the sum of \$3,000,000.00 for speculative operations in the capital stock of Transamerica Corporation, which said transactions resulted in a profit to said trust of \$300,000.00

Fifth: The transaction the gist of which appears in paragraph XXXIX, in which it is alleged that in the years 1932 to 1937, inclusive, the defendants caused Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, to

incur large items of expense and suffer losses with regard to the purchase of the capital stock of the defendant Transamerica Corporation, which caused injury and detriment to Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders, in the sum of not less than \$2,250,000.00.

This motion is made without prejudice to the motion heretofore made to dismiss the action, based upon the same ground, and the motion hereinafter made to strike the complaint from the file on the same ground.

This motion is made upon the ground that the Second Amended Complaint unites and does not state in separate counts the several alleged claims founded upon separate alleged transactions or occurrences, in violation of the provisions of paragraph (b) of [220] Rule 10 of the Federal Rules of Civil Procedure, and in violation of the directions of this Court, given at the time permission was granted to the plaintiff to file an amended bill; that the defendants involved in the first alleged transaction are not the same as the defendants involved in the second, third, fourth or fifth transaction; that the defendants involved in the second, third, fourth and fifth transactions are different; that according to the allegations of the Second Amended Complaint the defendants joining in this motion were directors during only a portion of the time that some of the transactions set forth in the first cause of action occurred; that the plaintiff's alleged right to recover in behalf of Transamerica Corporation

is based upon separate and distinct theories respecting each of said five alleged transactions; that plaintiff's alleged right to recover in behalf of Transamerica is based upon separate and distinct facts with reference to each of said five alleged transactions; that said five alleged transactions are alleged to have occurred during different times, and the officers and directors of Transamerica Corporation during the time of said alleged respective transactions were different; that a statement in separate counts of said five transactions will facilitate the clear presentation of the special defenses thereto of the defendants herein named, both severally and jointly, and will avoid the necessity on the part of these defendants of making answer to or defending against alleged transactions in which they admittedly were not involved, and said separate statement is necessary in order to permit these defendants to assert their defense to said action.

MOTION FOR A MORE DEFINITE STATEMENT OR A BILL OF PARTICULARS.

III. For an order requiring the plaintiff to make a more [221] definite statement of or bill of particulars with respect to, the following items, as to each of which these defendants desire more definite particulars, and as to which the Second Amended Complaint is defective:

1. What was the total amount of issued and outstanding shares of capital stock of Transamerica on the date of commencement of this action, as contrasted with the fifty-seven shares owned by the

plaintiff, as set forth in paragraph III of the Second Amended Complaint.

2. What was the extent of the ownership of the stock of the defendant Transamerica, of defendants Amadeo P. Giannini, L. M. Giannini, John M. Grant, and the other defendants, and what were the periods of time during which said shares were held, and particularly, whether the stock owned, if any, by all of the defendants, equalled a majority of the stock of Transamerica Corporation.

3. What was the extent and number of the shares of stock of defendant Transamerica Corporation, as to which the defendants Amadeo P. Giannini, L. M. Giannini, and other defendants, held proxies, and what was the period of time during which such proxies were held.

4. How or in what manner the defendants procured, obtained, had, held and exercised full, complete and exclusive control of all of the issued and outstanding voting shares of capital stock of defendant Transamerica Corporation, as alleged in paragraph XXI, page 12, lines 14 to 19, of said Second Amended Complaint; what was the period of time during which said shares were held, and whether such control included the fifty-seven shares alleged to be owned by the plaintiff; whether such control was through proxies or stock ownership, and if through proxies, the period of time during which said proxies were held, and by [222] whom.

5. Whether the members of the Board of Directors of Transamerica Corporation, as set out in paragraph XXII, page 12, line 27, to page 13, line 6,

at all times constituted a majority of the members of said Board of Directors, and if not at all times, then at what times.

6. Who were the directors who were not members of the alleged conspiracy, and who were not puppet and dummy directors, who discovered the matters complained of in said Second Amended Complaint and failed to take action to redress or prevent the continuance of said wrong, as alleged in paragraph XXV, page 17, lines 15 to 24, of said Second Amended Complaint, and whether said members of the Board of Directors constituted a majority thereof, and the times during which they were directors.

7. Wherein the action of the defendant Transamerica Corporation in the absorption of the capital stock and assets of Bancitaly Corporation was without legal right or authority, as alleged in paragraph XXVI, page 17, line 26, to page 18, line 28, of said Second Amended Complaint, and wherein the entries referred to in said paragraph were pretended, fraudulent and fictitious.

8. Wherein the liability of said Bancitaly Corporation, as evidenced by said salary agreement, was pretended, fraudulent and fictitious, as alleged in paragraph XXVI, page 18, lines 1 and 2, of said Amended Complaint, and whether, at the time of the assumption of said contract by Transamerica Corporation on the 25th day of May, 1929, as alleged in paragraph XXVI of said Amended Complaint, or thereafter, these defendants, or any of them, knew that said contract was fictitious, void or fraudulent.

9. To what extent were the credit entries referred to in paragraph XXVII, page 20, lines 7 to 28, of said Second Amended Complaint, in excess of the actual and true net profits of [223] Bancitaly Corporation or Transamerica Corporation.

10. Wherein were the entries made by Transamerica Corporation and its subsidiaries with regard to said contract of employment, as alleged in paragraph XXVII, page 19, line 19, to page 20, line 6, "purported, false, fraudulent and fictitious."

11. Wherein did the amount credited to Amadeo P. Giannini, L. M. Giannini and Virgil Giannini, not truly and correctly represent five per cent of the actual and true net profits of said corporation and its corporate subsidiaries for said period, as alleged in paragraph XXVII, lines 7 to 17, of said Second Amended Complaint, and wherein was the said salary computed upon false, fictitious, unearned and unrealized profits, and to what extent was it so computed, as alleged in paragraph XXVII, page 20, lines 17 to 20.

12. In what respect was the payment of \$3,700,000.00 made to A. P. Giannini and others, as alleged in paragraph XXVIII, page 20, line 30, to page 21, line 19, without legal right or authority; to what extent, if any, did the said amount exceed 5% of the actual and true net profits of Transamerica Corporation, and wherein were the defendants Amadeo P. Giannini, L. M. Giannini and Virgil Giannini unjustly enriched in the sum of \$3,700,000.00, as alleged in paragraph XXVIII of said Second Amended Complaint, page 21, line 29, to page 22, line 15.

13. Wherein the records and books of account kept and maintained by Transamerica Corporation were manipulated by an involved, intricate and complex system of accounting, as alleged in paragraph XXIX, page 22, lines 24 to 27, of said Second Amended Complaint, and how the said system of accounting was in conflict with the usual, customary, and proper and recognized principles of the science of accounting, and what were the false, misleading, untrue and fictitious names and designations under which payments [224] and disbursements to defendant Amadeo P. Giannini, as alleged in said paragraph XXIX, page 23, lines 3 to 8, were covered, disguised and concealed; and what was the knowledge and understanding of the plaintiff with respect to accounting.

14. What acts alleged in the complaint were committed by the defendants joining in this motion, and the time, facts and circumstances connected therewith.

15. What part of the alleged \$3,700,000.00 referred to in paragraph XXVI to XXIX was paid from the assets of Transamerica, and what part was paid from the assets of its subsidiaries, and the amount paid by each.

In respect to this motion and the specifications therein contained, this motion is made in the alternative, and without prejudice to the Motion to Strike, based in whole or in part on the same grounds, and without prejudice to the foregoing motion to dismiss, and to state separate causes of action in separate counts.

The foregoing motion will be made upon the ground that the Second Amended Complaint lacks definiteness in the particulars specified, and is defective in that regard, and that the details desired by the defendants joining in this motion, and each of them, are necessary to enable them, and each of them, to properly prepare their or his responsive pleading, and to prepare for trial.

**MOTION TO STRIKE OUT THE ENTIRE
SECOND AMENDED COMPLAINT**

IV. For an order striking the entire Second Amended Complaint from the files, for all the reasons set forth in subdivisions (f) and (g) of the foregoing Motion to Dismiss. [225]

**MOTION TO STRIKE OUT DESIGNATED
PORTIONS OF THE SECOND AMENDED
COMPLAINT**

V. In the alternative, and without prejudice to the foregoing motion to strike the entire complaint, for an order striking the following matters from the Second Amended Complaint:

1. All of paragraphs XXX to XLI, inclusive, in which are set forth transactions alleged to have been entered into after these defendants had ceased to be members of the Board of Directors, or otherwise connected with Transamerica Corporation.

2. All of paragraph XIX of said Second Amended Complaint, on the ground that in said paragraph the said plaintiff alleges a conspiracy entered into by defendants and a great number of other persons, but fails to set forth in the said Sec-

ond Amended Complaint any overt act performed by these defendants, or any of them, from which any damage arose, or that these defendants authorized or assisted in, or even had knowledge of, any such overt act.

Said motion will be made upon the ground that the matters above specified are, as to the defendants joining in this motion, redundant, immaterial and impertinent.

KEYES & ERSKINE,
By HERBERT W. ERSKINE,
HERBERT W. ERSKINE,
LOUIS FERRARI,

Attorneys for defendants A. H. Giannini, William E. Blauer, Leon Bocqueraz, E. H. Clark, Charles N. Hawkins, W. F. Morrish, A. J. Mount, Alfred E. Sbarboro, James A. Bacigalupi, George A. Webster, C. R. Bell, W. W. Garthwaite and Louis Ferrari, jointly and severally.

The address of said attorneys is:
625 Market Street,
San Francisco, California. [226]

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq., Homer N. Boardman, Esq., and Joseph A. Rus-
kay, Esq., Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before this Court Honorable Harry A. Hollzer, District Judge at Court Room No. 2, Post Office and Federal

Courts Building, City of Los Angeles, California, on the 1st day of October, 1942, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

You Will Further Take Notice that all of said motions will be made upon the files and records herein, including the Second Amended Complaint, said motions and this notice, and the affidavits of Edmund Nelson and Hector Campana attached hereto.

Please Take Further Notice that defendants A. H. Giannini, William E. Blauer, Leon Bocqueraz, E. H. Clark, Charles N. Hawkins, W. F. Morrish, A. J. Mount, Alfred E. Scarboro, James A. Bacigalupi, George A. Webster, C. R. Bell, W. W. Garthwaite and Louis Ferrari will, jointly and severally, rely upon points and authorities in support of said motions, a copy of which is herewith served upon you.

Dated: September 15, 1942.

KEYES & ERSKINE,
By HERBERT W. ERSKINE,
HERBERT W. ERSKINE,
LOUIS FERRARI,

Attorneys for Defendants A. H. Giannini, William E. Blauer, Leon Bosqueraz, E. H. Clark, Charles N. Hawkins, W. F. Morrish, A. J. Mount, Alfred E. Sbarboro, James A. Bacigalupi, George A. Webster, C. R. Bell, W. W. Garthwaite and Louis Ferrari, jointly and severally,

625 Market Street,

San Francisco, California. [227]

[Title of District Court and Cause.]

AFFIDAVIT OF EDMUND NELSON

State of California

County of Los Angeles—ss

Edmund Nelson, being first duly sworn, deposes and says:

I am now and for many years last past have been an attorney at law admitted to practice in the courts of the State of California and in the District Courts of the United States in said State. My office and place of business is at 650 South Spring Street, in the City of Los Angeles, in said State. I am the attorney of record in the above entitled action for the defendant, Transamerica Corporation. [228]

I was present in the Court Room of Hon. Harry A. Hollzer, Judge of the above entitled court, during the hearings on June 23, June 24 and June 25, 1942, on the motions of several of the other defendants to dismiss said action and for other relief, except for the period of about one hour in the forenoon of June 25th. During the course of the arguments I heard the discussions of other counsel in the case and of the Judge of the Court with reference to certain information requested by counsel for the plaintiff in said action, and by counsel for the plaintiff in another action on hearing at the same time entitled *Abrams vs. Avery, et al.*, numbered 1393-H on the Register of Actions of said court.

On August 6, 1942, at Los Angeles, California, on request of counsel for the plaintiff in the above entitled action, I delivered to said counsel the following:

1. Copies of the form of 14 proxies by which stock of Transamerica Corporation was voted at its stockholder elections from February 9, 1929, to and including March 26, 1942, with a statement attached to each proxy form showing the date each proxy was used, the number of shares then outstanding, the number of shares voted by the proxy, the number of shares voted in person, and the total number of shares voted.

2. A list of the persons who were elected and held office as directors of Transamerica Corporation from October 31, 1928, to March 26, 1942.

3. A copy of a communication addressed to the stockholders of Transamerica Corporation by [229] Elisha Walker and James A. Bacigalupi on December 9, 1931.

4. A copy of a communication addressed to the stockholders of Transamerica Corporation by Elisha Walker and James A. Bacigalupi on January 30, 1932.

On August 7, 1942, at the same place, on request of counsel for the plaintiff in said case entitled *Abrams vs. Avery, et al.*, I delivered to said counsel copies of the same papers.

Further affiant sayeth not.

EDMUND NELSON.

Subscribed and sworn to before me this 11th day of September, 1942.

[Seal]

CLARA KLEINMAN,
Notary Public in and for the County of Los Angeles, State of California. [230]

[Title of District Court and Cause.]

AFFIDAVIT OF HECTOR CAMPANA

State of California

City and County of San Francisco—ss.

Hector Campana, first being duly sworn, deposes and says:

That he is a citizen of the United States, and a resident of Larkspur, Marin County, State of California; that he is an officer, to-wit, Vice President, of Transamerica Corporation, and has been such for four years last past;

That during all of the years 1930 and 1931 he was an Assistant Secretary of Transamerica Corporation; that part of his duties as such Assistant Secretary was the mailing to stockholders of such notices, Communications and dividend checks as the corporation sent to its stockholders; that he received the said notices, communications and dividend checks from the officers of the corporation, and attended to the printing of the notices and communications, and to the disbursement of the dividends; that the mailing of such notices, communications and dividend checks was under his direct supervision;

That a few days prior to the 8th day of December, 1931, [231] he was given by the officers of Transamerica Corporation a letter to stockholders, dated December 9, 1931, a copy of which is hereunto annexed and marked Exhibit "A", and which is referred to in the accompanying affidavit of Edmund Nelson; that he was directed to have said letter printed and sent to all the stockholders of said

corporation whose names appeared as such on the books of said corporation; that he personally supervised the printing and mailing of said letter; that copies of said letter were enclosed in an envelope, properly sealed, addressed to each stockholder, at the address of said stockholder as it appeared on the books of the corporation, with the postage thereon prepaid; that upon said envelope was printed the following: "If Not Delivered in Five Days, Return to Box 3152, San Francisco, California." That said Box No. 3152 was a Post Office box, at which was delivered mail addressed to Transamerica Corporation, and said Transamerica Corporation received its mail addressed to it in San Francisco at said box.

That the said envelopes containing the said letters so addressed and with postage prepaid were, on or about the 8th day of December, 1931, delivered to the United States Post Office in San Francisco for delivery to the addressees; that a copy of the letter hereunto attached and marked Exhibit "A" was enclosed in an envelope, postage prepaid, addressed to Rose Papantonio at 711 East 227th Street, New York City, N. Y., and was delivered to the Postmaster in San Francisco for delivery to said Rose Papantonio, together with envelopes containing copies of the same letter, addressed to the other stockholders.

That it was the custom of the Post Office at said time to return to said Transamerica Corporation all letters sent by Transamerica Corporation which, for any reason, were not delivered [232] to the ad-

dressees named therein; that some of the letters sent on December 8, 1931 were returned by the Postmaster by reason of his inability to deliver the same to the addressee named;

That the letter sent to Rose Papantonio on said December 8, 1931 was not among the letters which were returned by the Post Office;

That this affiant, previous to and since said 8th day of December, 1931, sent out dividend checks, notices and other communications to the stockholders of Transamerica Corporation, including said Rose Papantonio, at the above address; that the said notices, communications and dividends were all sent in the same manner as the aforesaid letter; that at no time has Transamerica Corporation ever received any notice from Rose Papantonio to the effect that any such mail has ever failed to reach her, and all dividend checks mailed to said Rose Papantonio during said time have been received, endorsed and cashed by her.

HECTOR CAMPANA.

Subscribed and sworn to before me, this 14th day of September, 1942.

[Seal] JOHN F. BURNS,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission Expires April 12, 1945. [233]

EXHIBIT "A"

Transamerica Corporation

San Francisco, California,

December 9, 1931

To the Stockholders of

Transamerica Corporation:

In connection with the enclosed letter to stockholders from the Board of Directors with reference to "Associated Transamerica Stockholders," and in view of the attack upon the policies of the present management by this group, your officers take this opportunity to communicate to all stockholders information which we have already given to some in answer to inquiries, and which we believe, will make it clear that stockholders, for their own good, should support the present Board of Directors which is responsible for the management of the Corporation.

I.

In its letter, your Board of Directors states again the reasons for adopting the policy of ultimately disposing of the shares of stock in the banks controlled by Transamerica, namely that it is essential to the complete success of a bank that it should be operated and publicly regarded as an independent institution without responsibility for, or connection with, any other business. In order that there may be no misunderstanding, we wish to emphasize, as previously announced, that no plan for disposing of Transamerica's holdings of stock of Bank of America N. T. & S. A. (California) will be adopted without a vote of the stockholders of Transamerica at a

meeting called for that purpose, nor will Transamerica stockholders be asked to vote on any plan until they have had an opportunity fully to inform themselves regarding it at the time of its submission. Pending the approval of any such plan, the Corporation will not dispose of any of its holdings in the stock of that Bank.

II.

In the recent communication from "Associated Transamerica Stockholders," reference is made to salaries and compensation of officers. It is proper to state the following for the information of stockholders:

(1) The present officers of the Corporation and its subsidiaries are receiving and have received during the period of the present administration only normal salaries, commensurate with the duties and responsibilities of their respective offices.

(2) The only record of extraordinary compensation relates to Mr. A. P. Giannini, although he allowed the impression to be created that he worked for little or no compensation. In 1927, the Board of Directors of Bancitaly Corporation, predecessor of Transamerica, adopted a resolution approving the payment to Mr. Giannini, as President of Bancitaly Corporation, of 5% of the profits each year. This arrangement was not continued after the formation of Transamerica Corporation, but presumably based upon his claim to such a percentage of the profits of Bancitaly Corporation, there was placed to Mr. Giannini's credit from the cash funds of Bancitaly Corporation or subsidiaries of Transamerica, dur-

ing the three year period 1927-1930 no less than Three million seven hundred thousand dollars (\$3,700,000). This sum does not include the One million five hundred thousand dollars (\$1,500,000) given at Mr. Giannini's request by Bancitaly Corporation to the University of California to establish the Giannini Foundation and for the building of Giannini Hall, making Five million two hundred thousand dollars (\$5,200,000) in all. Of said Three million seven hundred thousand dollars (\$3,700,000), Two million four hundred thousand dollars (\$2,400,000) was placed to his credit between December 30, 1929 and January 21, 1930, after the stock market crash and immediately before his retirement from active service with the Corporation. All of said Three million seven hundred thousand dollars (\$3,700,000) has been withdrawn by, or paid upon the order of, Mr. A. P. Giannini, except an unpaid balance of Seven hundred ninety-two thousand dollars (\$792,000) which in September of this year Mr. Giannini demanded and which the present Board of Directors, on the advice of counsel, has refused to pay. The Board has sought the advice of eminent counsel, regarding the legality of the payments made to Mr. Giannini. [234]

III.

The recent communication of "Associated Trans-america Stockholders" refers to the right stockholders to full information regarding the affairs of their Corporation. It will be remembered that during Mr. A. P. Giannini's administration, when he

held seven-year proxies from holders of a majority of the stock, stockholders were furnished with only the most meager reports which did not explain the Corporation's financial position. The management which succeeded Mr. Giannini determined to change these methods. One of their first acts was to employ Messrs. Ernst & Ernst, certified public accountants, to make a thorough study of the Corporation's affairs. After receiving the report of these accountants, the Board of Directors issued to stockholders their full statement dated July 12, 1930, which was the first official statement adequate to enable stockholders to form their own opinions as to the value of their property. At the same period the Board of Directors caused the shares of the Corporation to be listed on the New York Stock Exchange, with whom they entered into an agreement to publish audited annual statements to stockholders.

IV.

The spokesman for the "Associated Transamerica Stockholders" calls attention to the decline in the market value of Transamerica stock which had progressed far during Mr. Giannini's regime and has continued during the administration of the present management. Some of the causes of this decline are as follows:

(1) The decline followed the nation-wide decline of security prices and especially of the shares of investment companies.

(2) The absence of accurate information regarding the Corporation during the former administra-

tion resulted in surrounding the stock with mystery which doubtless contributed to its rise during the years of generally rising prices, but operated in contrary fashion to bring down the price of the stock when the market turned.

(3) The fact that when the entire market began to decline at the end of October, 1929, the Corporation under Mr. Giannini's direction maintained Transamerica at a high and artificial level from which it fell rapidly when the support was removed. During the four weeks ending October 28, 1929, over \$68,000,000 was expended by the Corporation in the purchase, on balance, of over 1,090,000 shares of Transamerica stock at an average cost of over \$62.50 per share. This policy of attempting to hold the price of Transamerica stock, when the prices of all other securities were dropping rapidly left the corporation at the end of 1929 with a serious reduction in quick assets and with large indebtedness. Another result of that artificial and costly attempt of Transamerica to peg the market value of its own stock was to give speculators and market operators an opportunity of selling their stock to the Corporation at high prices, while loyal stockholders, uninformed of the situation, suffered great losses. Those who sold during this period profited, while those who remained loyal shared in the loss to the Corporation resulting from the purchases of Transamerica stock. Following the stock market crash in the fall of 1929, the Corporation faced a difficult future. It was at this point that Mr. Giannini retired.

V.

The charge that the fall in the value of Trans-america stock is due to manipulation and sales by persons associated with the present management is not true. Your Chairman wishes to point out to stockholders that since he became your chief executive officer he has been the largest holder of Trans-america stock and that he has never sold a single share of his holdings or in any way speculated in the stock, directly or indirectly.

VI.

The "Associated Transamerica Stockholders" refer to the dividend policy during Mr. Giannini's regime and the reduction and later the suspension of dividends, which occurred prior to the election of the present Board. The dividend policy during Mr. Giannini's regime was made possible by the appreciation in securities generally during an exceptional period of rising prices. Such dividend policy was bound to end upon the advent of the period of rapidly declining prices which began in the fall of 1929 and has continued until the present time. Mr. Giannini's retirement coincided with the beginning of the period of declining prices, since which time the principal source, and indeed almost the only source, of income for dividends has been the current income of the Corporation's investments. Your Board's decision to interrupt the payment of dividends was a wise and necessary measure to conserve the Corporation's cash resources in order to provide for the reduction of the Corporation's large floating

debt, chiefly caused, as pointed out above, by the large purchases of Transamerica shares at high prices during Mr. Giannini's regime. [235]

VII.

The suggestion that your Board of Directors is disposing of the Corporation's assets unwisely is incorrect. The merger of The Bank of America N. A. (New York) with The National City Bank of New York, which has recently been consummated by virtue of an overwhelming vote of the shareholders of both banks, is most beneficial to Transamerica stockholders. As a result of this merger, Transamerica now owns, in place of 63% of the stock of The Bank of America N. A. (New York), a very substantial interest in The National City Bank, one of the largest banks of the world. This merger should materially increase the value of this investment. Based on relative dividends currently paid at the time of the merger it will result in a material increase in the income from this investment.

VIII.

It is true, as stated by the "Associated Transamerica Stockholders," that the asset values given in the circular of the present Board under date of September 22 differ from the book values published two years earlier. The change is due to the fact that the Corporation's investments in controlled banks and other subsidiaries had been previously carried at the cost thereof at a time when prices were materially higher than today, while the revised

statement on which the letter of September 22 was based, gives the net asset value of the subsidiaries regardless of their cost and after eliminating all value for good will and providing substantial reserves. The latest statement was made in this form in order that stockholders might have reliable and unvarnished information regarding the net asset value of their investment.

IX.

The Board of Directors aims to improve the condition of the properties in their charge and to place the enterprise on a sound and conservative basis. Definite progress has already been made in that direction which should make possible the resumption of dividends as soon as general conditions will permit.

Stockholders are earnestly urged, in their own interest, to support the present Board of Directors of the Corporation, and to sign and return the enclosed proxy, without delay, in the enclosed envelope.

If, after reading this letter, you have any doubt as to what action you should take, you are urged, in your own interest, to consult any bank or banker of standing in your community.

Yours sincerely,

ELISHA WALKER

JAMES A. BACIGALUPI [236]

Affidavit of Service by Mailing

State of California,

County of Los Angeles—ss.

Leroy J. Mack, being first duly sworn, deposes and says: I am now and at all times herein mentioned was a citizen of the United States of America and a resident of the County of Los Angeles, State of California, over the age of eighteen years and not a party to or interested in the above entitled action. My business address where I am employed is 650 South Spring Street, Los Angeles, California. On the 15th day of September, 1942, I personally served the foregoing and attached Motions and Notice of Motion on Vincent Anthony Marco, Homer N Boardman and Percy V. Clibborn, the attorneys for the plaintiff in said action, by enclosing a true copy thereof in a sealed envelope addressed to said attorneys at their business address at 9730 Wilshire Boulevard, Beverly Hills, California, and by depositing said sealed envelope containing said enclosure, with the postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, between which said place of mailing and the place so addressed there is regular daily communication by and delivery of United States mail.

LEROY J. MACK

Subscribed and sworn to before me this 15th day of September, 1942.

[Seal]

CLARA KLEINMAN,

Notary Public in and for said County and State.

[Endorsed]: Filed Sep. 15, 1942. [237]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANTS, CHARLES de Y. ELKUS, AND CHARLES de Y. ELKUS, WILLIAM S. HOELSCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C. WALSTON AND CLAIRE GIANNINI HOFFMAN, TRANSACTING BUSINESS AS CO-PARTNERS UNDER THE FIRM NAME AND STYLE OF WALSTON & CO., AND WALSTON & CO., A CO-PARTNERSHIP, JOINTLY AND SEVERALLY:

- (1) TO DISMISS THE ACTION.
- (2) FOR STATEMENT IN SEPARATE COUNTS OF VARIOUS ALLEGED CAUSES OF ACTION.
- (3) FOR A MORE DEFINITE STATEMENT AND BILL OF PARTICULARS. [238]

Defendants, Charles de Y. Elkus, and Charles de Y. Elkus, William S. Hoelscher, Clifford P. Hoffman, C. J. Smith, Vernon C. Walston and Claire Giannini Hoffman, transacting business as co-partners under the firm name and style of Walston & Co., and Walston & Co., a co-partnership, (hereinafter referred to as "moving defendants") jointly and severally move the court as follows:

I. MOTION TO DISMISS

To dismiss the above entitled action as against the moving defendants and each of them, on the following grounds:

(1) That said second amended complaint fails to state a claim against the moving defendants or any of them upon which relief can be granted, for the reason that the alleged claims set forth therein against said moving defendants, jointly and severally, are barred by the provisions of Section 338(4), Section 339(1) and Section 343 of the Code of Civil Procedure of the State of California.

(2) That said second amended complaint fails to state a cause of action against the moving defendants or any of them upon which relief can be granted, for the reason that the alleged claims set forth therein against said moving defendants, jointly and severally, are barred by laches of plaintiff in delaying unduly the institution of this suit to the prejudice of the moving defendants and each of them.

(3) That there is a failure to set forth with particularity sufficient excuse for plaintiff's admitted failure to endeavor to have the board of directors of Transamerica Corporation bring this action.

(4) That there is a failure to allege an effort by plaintiff to obtain action by the stockholders of Transamerica Corporation or any sufficient excuse for not doing so.

(5) That various claims are asserted in said second amen- [239] ded complaint founded upon separate and different transactions and occurrences without being stated in separate counts, as required by Rule 10(b) of the Rules of Civil Procedure for the District Courts of the United States and con-

trary to the directions and order of the above entitled court upon the hearing of the motions previously addressed to the first amended complaint herein.

II. MOTION FOR STATEMENT IN SEPARATE COUNTS OF VARIOUS ALLEGED CAUSES OF ACTION.

In the alternative, and without prejudice to the foregoing motion to dismiss, for an order requiring plaintiff to state in separate counts the various claims founded upon the following separate transactions and occurrences:

(a) The claim alleged in Paragraphs XXVI to XXIX, both inclusive, of said second amended complaint pertaining to the assumption by Transamerica Corporation of the salary agreement between A. P. Giannini and Bancitaly Corporation, together with certain alleged fictitious credit entries made pursuant thereto and the subsequent entry of fictitious credits by Transamerica Corporation pursuant to said salary agreement and payments made by said corporation in accordance with said entries.

(b) The claim alleged in Paragraphs XXX to XXXIII, both inclusive, of said second amended complaint pertaining to the creation of the firm of Walston & Co., and the alleged diversion of funds and security business of Transamerica Corporation to Walston & Co.

(c) The claim alleged in Paragraphs XXXIV to XXXVI, both inclusive, pertaining to the payment of funds by Transamerica Corporation and

its subsidiaries, departments and instrumentalities, to the defendants to enable the latter to acquire the [240] controlling interest in Bankitaly Mortgage Company, and for capital of the latter corporation, and pertaining to the profits allegedly made by said corporation in speculative transactions in Transamerica stock, which profits allegedly were paid to and received by defendants.

(d) The claim alleged in Paragraphs XXXVII and XXXVIII of said second amended complaint pertaining to the alleged transfer of funds by Transamerica Corporation, and its subsidiaries, departments and instrumentalities, to the Smith-Mallory syndicate for speculative transactions in the stock of Transamerica, which transactions allegedly resulted in a profit that was paid to and received by defendants.

(e) The claim alleged in Paragraph XXXIX of said second amended complaint, in which it is alleged that defendants caused Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities to manipulate the market in Transamerica stock, and to incur large items of expense and suffer substantial losses in connection therewith.

This motion is made upon the ground that the second amended complaint contains five claims founded on five separate transactions and occurrences, without stating them in separate counts, as required by Rule 10(b) and as directed by the court at the time that plaintiff was ordered to file an amended complaint herein; that the various claims

are founded upon different and distinct theories and facts, and that the defenses of the various defendants can best and more properly be urged if the aforesaid claims are separately stated; that this is particularly true with reference to the defense of the statute of limitations and laches, which must be considered separately according to the particular type of claim involved and the facts and circumstances relative thereto, especially as to the sufficiency of the allegations of Paragraph XLI, in which plaintiff purports to explain and excuse her failure to discover the alleged frauds and to institute this action at an earlier date.

III. MOTION FOR A MORE DEFINITE STATEMENT OF A BILL OF PARTICULARS

In the alternative, and without prejudice to the preceding motion to dismiss, for an order requiring plaintiff to make a more definite statement of or bill of particulars in respect to the following matters, as to each of which the moving defendants desire more definite particulars and as to which said second amended complaint is defective:

(1) What was the total amount of issued and outstanding shares of capital stock of Trans-america on the date of commencement of this action, as contrasted with the fifty-seven shares owned by the plaintiff, as set forth in Paragraph III of the second amended complaint.

(2) What are the "various private, personal and individual business enterprises" referred to in

lines 8 and 9, page 9 of said second amended complaint.

(3) What “fraudulent, fictitious and pretended contracts and agreements” are referred to in lines 15 and 16, page 9, of said second amended complaint.

(4) What “other corporations, associations and copartnerships” are referred to in line 17, page 10, of said second amended complaint.

(5) How or in what manner the defendants procured, obtained, had, held and exercised full, complete and exclusive control of all of the issued and outstanding voting shares of capital stock of defendant Transamerica Corporation, as alleged in Paragraph XXI, page 12, lines 14 to 19, of said second amended complaint; [242] what was the period of time during which said shares were held, and whether such control included the fifty-seven shares alleged to be owned by the plaintiff, whether such control was through proxies or stock ownership, and if through proxies, the period of time during which said proxies were held, and by whom.

(6) In what manner and to what extent did the moving defendants, or any of them, procure, have and exercise control of the issued and outstanding voting shares of capital stock of Transamerica Corporation at the respective times mentioned in said second amended complaint, and what number of shares, if any, were owned by said moving defendants, respectively, during the various times mentioned in said second amended complaint.

(7) Who were the directors who were not members of the alleged conspiracy, and who were not

puppet and dummy directors, who discovered the matters complained or in said second amended complaint and failed to take action to redress or prevent the continuance of said wrong, as alleged in Paragraph XXV, page 17, lines 15 to 24, of said second amended complaint, and whether said members of the board of directors constituted a majority thereof, and the times during which they were directors.

(8) By what means and to what extent did the moving defendants, or each or any of them, cause to be done the acts referred to in Paragraphs XXVI, XXVII, XXVIII, XXIX, XXXI, XXXII, XXXIII, XXXV, XXXVI, XXXVII, XXXIX, XL and XLI.

(9) Wherein the liability of said Bancitaly Corporation, as evidenced by said salary agreement, was pretended, fraudulent and fictitious, as alleged in Paragraph XXVI, page 18, lines 1 and 2, of said second amended complaint, and whether, at the time of the assumption of said contract by Transamerica Corporation on the 25th day of May, 1929, as alleged in Paragraph XXVI [243] of said second amended complaint, or thereafter the moving defendants, or any of them, knew that said contract was fictitious, void or fraudulent.

(10) To what extent were the credit entries referred to in Paragraph XXVII, page 20, lines 7 to 28, of said second amended complaint, in excess of the actual and true net profits of Bancitaly Corporation or Transamerica Corporation.

(11) Wherein were the entries made by Trans-

america Corporation and its subsidiaries with regard to said contract of employment, as alleged in Paragraph XXVII, page 19, line 19, to page 20, line 6, "purported, false, fraudulent and fictitious."

(12) Wherein did the amount credited to Amadeo P. Giannini, L. M. Giannini and Virgil Giannini, not truly and correctly represent five per cent of the actual and true net profits of said corporation and its corporate subsidiaries for said period, as alleged in Paragraph XXVII, lines 7 to 17, of said second amended complaint, and wherein was the said salary computed upon false, fictitious, unearned and unrealized profits, and to what extent was it so computed, as alleged in Paragraph XXVII, page 20, lines 17 to 20.

(13) In what respect was the payment of \$3,700,000.00 made to A. P. Giannini and others, as alleged in Paragraph XXVIII, page 20, line 30, to page 21, line 19, without legal right or authority; to what extent, if any, did the said amount exceed 5% of the actual and true net profits of Transamerica Corporation, and wherein were the defendants A. P. Giannini, L. M. Giannini and Virgil Giannini unjustly enriched in the sum of \$3,700,000.00, as alleged in Paragraph XXVIII of said second amended complaint, page 21, line 29, to page 22, line 15.

(14) Wherein the records and books of account kept and maintained by Transamerica Corporation were manipulated by an [244] involved, intricate and complex system of accounting, as alleged in Paragraph XXIX, page 22, lines 24 to 27, of said second amended complaint, and how the said system

of accounting was in conflict with the usual, customary and proper and recognized principles of the science of accounting, and what were the false, misleading, untrue and fictitious names and designations under which payments and disbursements to defendant A. P. Giannini, as alleged in said Paragraph XXIX, page 23, lines 3 to 8, were covered, disguised and concealed.

(15) How and to what extent did the moving defendants, or any of them, intend to enrich themselves by reason of the credits in favor of A. P. Giannini, L. M. Giannini and Virgil D. Giannini, as alleged in Paragraph XXVI of said second amended complaint.

(16) How and to what extent did the moving defendants, or any of them, intend to enrich themselves by reason of the credits in favor of A. P. Giannini, L. M. Giannini and Virgil D. Giannini, as alleged in Paragraph XXVII of said second amended complaint.

(17) How and to what extent, respectively, were the moving defendants, and each or any of them, benefited and enriched by reason of the payments made to A. P. Giannini, L. M. Giannini and V. D. Giannini, as alleged in Paragraph XXVIII of said second amended complaint.

(18) What specific sums were paid to and received and accepted by the respective moving defendants, or any of them, out of the total sum of \$300,000.00, as alleged in Paragraph XXXVIII of the said second amended complaint.

(19) How and in what respective sums were

the moving defendants, or any or each of them, benefited by the expenses paid and losses suffered by Transamerica Corporation, as alleged in [245] Paragraph XXXIX of said second amended complaint.

(20) How and to what extent were the moving defendants, exclusive of Claire G. Hoffman, benefited or enriched by the disbursement of \$548,000.00 to A. P. Giannini, L. M. Giannini, Claire G. Hoffman and Virgil D. Giannini, as alleged in Paragraph XXXII of said second amended complaint.

(21) What specific amounts were paid or advanced by Transamerica Corporation or its subsidiaries, departments and instrumentalities to the respective moving defendants, or any or each of them, as alleged in Paragraph XXXV of said second amended complaint.

(22) What number of shares of stock of Bank-italy Mortgage Company, if any, were acquired by the respective moving defendants, or any or each of them, as alleged in Paragraph XXXV of said second amended complaint.

(23) What specific sums were paid to and received and accepted by the respective moving defendants, or any or each of them, out of the sum of \$2,000,000.00, as alleged in Paragraph XXXVI of said second amended complaint.

The foregoing motion will be made upon the ground that the second amended complaint lacks definiteness in the particulars specified, and is defective in that respect, and that the information desired by the moving defendants is necessary to

enable them to properly prepare their responsive pleading and to prepare for trial.

BACIGALUPI, ELKUS &
SALINGER

CLAUDE N. ROSENBERG

By CLAUDE N. ROSENBERG

Attorneys for defendants, Charles de Y. Elkus, and Charles de Y. Elkus, William S. Hoelscher, Clifford P. Hoffman, C. J. Smith, Vernon C. Walston and Claire Giannini Hoffman, transacting business as co-partners under the firm name and style of Walston & Co., and Walston & Co., a co-partnership, jointly and severally.

Address of said attorneys is:

300 Montgomery Street

San Francisco, California. [246]

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq., Homer N. Boardman, Esq., and Joseph A. Rus-
kay, Esq., attorneys for plaintiff:

Please take notice, that the undersigned will bring the above motion on for hearing before this Court Honorable Harry A. Hollzer, District Judge, at Court Room No. 2, Post Office and Federal Courts Building, City of Los Angeles, California, on the 1st day of October, 1942, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

You will further take notice, that all of said motions will be made upon the files and records herein, including the second amended complaint, said motions and this notice.

Please take further notice, that defendants, Charles de Y. Elkus, and Charles de Y. Elkus, William S. Hoelscher, Clifford P. Hoffman, C. J. Smith, Vernon C. Walston and Claire Giannini Hoffman, transacting business as co-partners under the firm name and style of Walston & Co., and Walston & Co., a co-partnership, will, jointly and severally, rely upon points and authorities in support of said motions, a copy of which is herewith served upon you.

BACIGALUPI, ELKUS &
SALINGER

CLAUDE N. ROSENBERG,
By CLAUDE N. ROSENBERG :

Attorney for Defendants, Charles de Y. Elkus, and Charles de Y. Elkus, William S. Hoelscher, Clifford P. Hoffman, C. J. Smith, Vernon C. Walston and Claire Giannini Hoffman, transacting business as co-partners under the firm name and style of Walston & Co., and Walston & Co., a co-partnership, jointly and severally.
300 Montgomery Street,
San Francisco, California. [247]

State of California,
City and County of San Francisco—ss.

F. M. Hoff, being first duly sworn, deposes and says:

That she is now and at all times herein mentioned was a citizen of the United States of America; that she is over the age of eighteen years and not a party to or in any way interested in the above en-

titled matter; that at all of said times she was and still is employed in the office of Bacigalupi, Elkus & Salinger, San Francisco, California; that on the 14th day of September, 1942, deponent served a copy the foregoing Motions in the above entitled matter upon the following named persons in the following manner, to-wit:

Vincent Anthony Marco, Esq.

Homer N. Boardman, Esq.

Percy V. Clibborn, Esq.

9730 Wilshire Boulevard

Beverly Hills, California

Deponent enclosed a copy of said Motions in an envelope addressed as above set forth, sealed the same and deposited it on the said date, so sealed and addressed, with the said enclosure, and with the postage thereon fully prepaid, in the United States Post Office in the City and County of San Francisco, State of California; that there is regular communication by United States Mail between the place of mailing and the place so addressed, and that there is delivery service by United States mail at the place so addressed.

F. M. HOFF

Subscribed and sworn to before me this 14th day of September, 1942.

[Seal] JOHN F. BURNS

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Sept. 15, 1942. [248]

[Title of District Court and Cause.]

MOTIONS BY DEFENDANT
HERBERT E. WHITE

- I. TO DISMISS THE ACTION.
- II. TO SEPARATELY STATE THE SEVERAL CAUSES OF ACTION IN SEPARATE COUNTS, SAID MOTION BEING WITHOUT PREJUDICE TO MOTIONS TO DISMISS AND TO STRIKE.
- III. FOR A MORE DEFINITE STATEMENT AND BILL OF PARTICULARS.
- IV. TO STRIKE OUT THE ENTIRE SECOND AMENDED COMPLAINT.
- V. TO STRIKE OUT CERTAIN DESIGNATED PORTIONS OF THE SECOND AMENDED COMPLAINT.

Defendant Herbert E. White moves the Court as follows:

MOTION TO DISMISS

1. To dismiss the action: [249]
 - (a) Because the Second Amended Complaint fails to state a claim against defendant upon which relief can be granted.
 - (b) Because the alleged claim set forth in said Second Amended Complaint against defendant is barred by the provisions of Section 338, subdivision 4, and Section 339, subdivision 1, of the Code of Civil Procedure of the State of California.
 - (c) Because the alleged claim set forth in said

Second Amended Complaint is barred by the laches of plaintiff in failing to use diligence in the prosecution of said claim and by the long delay in making this defendant a party to this action, which lack of diligence and delay have been highly prejudicial to this defendant.

(d) Because there is a failure to include indispensable parties defendant as parties to the action, to-wit, the subsidiaries of defendant Trans-America Corporation which are alleged to have suffered injury and detriment by the acts complained of.

(e) Because the court lacks jurisdiction and the Second Amended Complaint fails to state a claim against defendant upon which relief can be granted, for the reason that the Second Amended Complaint sets forth certain injury and damage to the subsidiaries of Transamerica Corporation and fails to allege that plaintiff was a stockholder of such subsidiaries, or any of them.

(f) Because the complaint consists entirely of sham, irrelevant, redundant and evasive allegations, and is not in compliance with the directions of the above Court in granting to plaintiff permission to file a Second Amended Complaint, and fails to set forth the undisputed facts that on December 9, 1931, the stockholders of Transamerica Corporation, including plaintiff, were sent a letter advising them that A. P. Giannini had received for his compensation the credits referred to in the Second Amended Complaint, and had withdrawn all but \$792,000.00 thereof, and that the Board of Directors of Trans-

america upon advice of counsel had [250] refused to pay defendant A. P. Giannini said balance, and that plaintiff had notice that thereafter, in February, 1932, A. P. Giannini was re-elected a director and officer of said corporation.

(g) Because plaintiff has entirely disregarded the directions of this Court at the time of the hearing of the motions herein directed at the First Amended Complaint with regard to setting up her causes of action in separate counts.

MOTION FOR AN ORDER REQUIRING PLAINTIFF TO SEPARATELY STATE CAUSES OF ACTION IN SEPARATE COUNTS

II. For an order requiring plaintiff to state in separate counts the claims founded upon the following separate transactions:

First: The transaction, the gist of which appears in paragraphs XXVI to XXIX inclusive, and in which it is alleged, defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannini, deceased, were unjustly enriched to the serious and irremediable injury of defendant Transamerica and its corporate subsidiaries, departments, instrumentalities and shareholders, to the extent of at least \$3,700,000.00, alleged to have been paid to said defendants on account of a salary agreement made between one Bancitaly Corporation and defendant Amadeo P. Giannini between April, 1929, and January, 1939.

Second: The transaction, the gist of which appears in paragraphs XXX to XXXIII, inclusive, and in which it is alleged, defendant Walston & Co. and its individual members were unjustly enriched in the years 1933 to 1938, inclusive, from the funds, moneys, assets and properties of defendant Transamerica Corporation and its corporate subsidiaries, departments and instrumentalities, to the serious injury and detriment of Transamerica, its subsidiaries, departments and instrumentalities and shareholders in the sum and amount and to the extent of at least approximately \$548,000.00.

Third: The transaction, the gist of which appears in [251] paragraphs XXXIV to XXXVI inclusive, in respect to which it is alleged that during the year 1932 the sum of approximately \$1,500,000.00 was advanced by Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, for the purpose of the acquisition of Bankitaly Mortgage Company, and to said Bankitaly Mortgage Company the further sum of \$1,500,000.00 for use as capital, and that said Bankitaly Mortgage Company, later Pacific Coast Mortgage Company, indulged in certain speculative transactions which resulted in a profit of \$2,000,000.00 in the years of 1933 to 1938, inclusive, by reason of which defendants were unjustly enriched to the serious and irremediable injury and detriment of defendant Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders in the amount of \$2,000,000.00.

Fourth: The transaction, the gist of which ap-

pears in paragraphs XXXVII and XXXVIII, in which it is alleged that Transamerica, its corporate subsidiaries, departments and instrumentalities, advanced to Charles J. Smith and Margaret Mallory, trustees, the sum of \$3,000,000.00 for speculative operations in the capital stock of Transamerica Corporation and in other stocks and securities, which transactions resulted in the years 1933 to 1936, inclusive, in a profit to said trust of \$300,000.00, and that defendants were unjustly enriched to the serious and irremediable injury and detriment of defendant Transamerica Corporation and its corporate subsidiaries, departments, instrumentalities and shareholders in the amount of \$300,000.00.

Fifth: The transaction, the gist of which appears in paragraph XXXIX, in which it is alleged that in the years 1932 to 1937, inclusive, defendants caused Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, to incur items of expense aggregating \$2,250,000.00 and suffer losses in "stirring" and manipulating the market for stock of Transamerica [252] Corporation, to the serious and irremediable injury and detriment of defendant Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders, in the amount of \$2,250,000.00.

This motion is made without prejudice to the motion heretofore made to dismiss the action, based upon the same ground, and the motion hereinafter made to strike the complaint from the files on the same ground.

This motion is made upon the ground that the Second Amended Complaint unites and does not state in separate counts the several alleged claims founded upon separate alleged transactions or occurrences, in violation of the provisions of paragraph (b) of Rule 10 of the Federal Rules of Civil Procedure, and in violation of the directions of this Court, given at the time permission was granted to the plaintiff to file an amended bill; that the defendants involved in the first alleged transaction are not the same as the defendants involved in the second, third, *four* or fifth transaction; that the defendants involved in the second, third, fourth and fifth transactions are different; that the plaintiff's alleged right to recover in behalf of Transamerica Corporation is based upon separate and distinct theories respecting each of said five alleged transactions; that plaintiff's alleged right to recover in behalf of Transamerica is based upon separate and distinct allegations with reference to each of said five alleged transactions; that said five alleged transactions are alleged to have occurred during different times, and the officers and directors of Transamerica Corporation during the time of said alleged respective transactions were different; that a statement in separate counts of said five transactions will facilitate the clear presentation of the special defenses thereto of this defendant, Herbert E. White, and that said separate statement is necessary in order to permit this defendant to assert his defense to said action. [253]

MOTION FOR A MORE DEFINITE STATEMENT OR FOR A BILL OF PARTICULARS

III. For an order requiring plaintiff to make a more definite statement of or a bill of particulars in respect to the following matters, as to each of which defendant desires more definite particulars and in respect to each of which the second amended complaint is defective:

1. Which of the corporations referred to in paragraph XXVI and elsewhere in said second amended complaint as "said corporation and its corporate subsidiaries, departments and instrumentalities" or by language of similar import (hereinafter in this motion referred to as "said corporations"), and if more than one to what extent each, was caused to acquire and absorb all of the capital stock of Bancitaly Corporation as alleged in [254] paragraph XXVI of said second amended complaint (p. 17, line 26 to p. 18, line 1).

2. How and by what means was said transaction accomplished.

3. Which of said corporations, and if more than one, to what extent each, was caused to acquire and absorb all of the assets of Bancitaly Corporation, as alleged in said paragraph XXVI (p. 17, line 26 to p. 18, line 1).

4. Which of said corporations, and if more than one to what extent each, was caused to appear to assume as its own obligations the alleged pretended, fraudulent and fictitious liabilities of said Bancitaly Corporation, as alleged in said paragraph XXVI (p. 17, line 26 to p. 18, line 17).

5. Which of said corporations, and if more than one to what extent each, was caused to make and enter certain purported false, fraudulent and fictitious credit entries, and upon the books of which of said corporations were said entries made, as alleged in paragraph XXVII (p. 19, line 19 to p. 20, line 6).

6. Which of said corporations, and if more than one, to what extent each, was caused to pay to defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannini, now deceased, sums as alleged in paragraph XXVIII of said second amended complaint (p. 20, line 30 to p. 21, line 29).

7. From the funds and assets of which of said corporations, and if more than one, the extent as to each, were defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannin, now deceased, unjustly enriched, and which of said corporations, and if more than one to what extent each, thereby suffered serious and irremediable injury and detriment, as alleged in paragraph XXVIII (p. 21, line 30 to p. 22, line 15).

8. Upon the books of which of said corporation, and if more than one, to what extent each, were the transactions [255] complained of in paragraphs XXVI, XXVII and XXVIII concealed, as alleged in paragraph XXIX of said Second Amended Complaint (par. XXIX, p. 22, line 7 to p. 23, line 8).

9. Which of said corporations, and if more than one, to what extent each, was actively engaged in a profitable brokerage business when defendant Walston & Co. was formed, as alleged in paragraph

XXX of said second amended complaint (p. 23, lines 10-29).

10. Which of said corporations' brokerage business, and if more than one, to what extent the brokerage business of each, was diverted to Walston & Co., as alleged in paragraph XXXI of said second amended complaint (p. 23, line 31 to p. 24, line 19).

11. Which of said corporations, and if more than one, to what extent each, was caused from time to time to disburse its funds and assets to Walston & Co., as alleged in paragraph XXXII of said second amended complaint (p. 24, line 21 to p. 25, line 25).

12. To which of said corporations did the business alleged to have been diverted to Walston & Co. belong, and if more than one, the extent as to each, as alleged in paragraph XXXII (p. 24, line 21 to p. 25, line 25).

13. From the funds, money, assets and properties of which of said corporations, and if more than one, the extent as to each, were defendants unjustly enriched, as alleged in said paragraph XXXII (p. 24, line 21 to p. 25, line 25).

14. Which of said corporations, and if more than one, to what extent each, was caused to pay and advance the sum of \$1,500,000.00, as alleged in paragraph XXXV of said second amended complaint (p. 26, line 29 to p. 27, line 25).

15. Which of said corporations, and if more than one, to what extent each, suffered the alleged detriment resulting from the payments and advances

alleged in paragraph XXXV of said second amended complaint (p. 27, line 26 to p. 28, line 4).

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16. To the extent that the same is not disclosed by the allegations of paragraph XXII and XXIII of said Second Amended Complaint, what position did each defendant and each of the persons referred to in paragraph XXXVI hold in said corporations, and if in more than one, the positions in each (p. 28, lines 18-41).

17. Which of said corporations, and if more than one to what extent each, suffered the serious and irremediable injury and detriment alleged in paragraph XXXVI (p. 29, lines 13-17).

18. Which of said corporations, and if more than one, to what extent each, was caused from time to time to pay and advance the sum of \$3,000.00 to the trustees mentioned in paragraph XXXVII of the second amended complaint, as alleged in said paragraph (p. 29, line 19 to p. 30, line 4).

19. To the extent that the same is not disclosed by the allegations of paragraphs XXII and XXIII of said second amended complaint, what official positions did the defendants and persons referred to in paragraph XXXVIII of said second amended complaint hold in said corporations, and if in more than one, the positions in each (p. 30, line 31 to p. 31, line 4).

20. Which of said corporations, and if more than one to what extent each, suffered the serious and irremediable injury and detriment alleged in said paragraph XXXVIII (p. 31, lines 16-20).

21. Which of said corporations, and if more than one, to what extent each, was caused to engage in the business of manipulating and steering the market for capital stock of defendant Transamerica Corporation and doing the other acts complained of in paragraph XXXIX of said second amended complaint, as alleged in said paragraph (p. 31, line 22 to p. 32, line 16), and which were injured thereby and to what extent.

22. Which of the items referred to in paragraph XL of said second amended complaint were disguised, camouflaged, [257] covered and concealed by entries on the books of which of said corporations, and if more than one, the extent as to each (p. 33, lines 11-15).

23. Has plaintiff at any time been the owner of shares of stock of any of the corporations alleged in paragraph II of the second amended complaint to be subsidiaries of defendant Transamerica Corporation, and if so, for what period did plaintiff own stock in each of said subsidiaries, and what was the number of shares of stock owned by plaintiff in each.

24. Upon what facts does plaintiff base her conclusion that an action to redress the alleged wrongs for which relief is sought in this action to be effective and complete must be directed against all of said defendants and persons named in the second amended complaint, as alleged in paragraph XLII thereof (p. 36, lines 24-26).

25. What facts constitute the basis of plaintiff's conclusion that a demand upon the Board of Di-

rectors of defendant Transamerica Corporation to bring this action would be and constitute a futile and idle act, as alleged in paragraph XLII of said second amended complaint (p. 36, lines 27-28).

26. How and by what methods and by what means have the defendants and persons referred to in paragraphs XXI and XLIII of said second amended complaint had and exercised complete and exclusive control of the voting shares of stock of defendant Transamerica Corporation, as alleged in said paragraphs of said second amended complaint (p. 12, lines 14-25, and p. 36, line 30 to p. 37, line 2, respectively); if by stock ownership, how many shares did they hold, what was the period of time during which shares were held, and whether such control included the 57 shares alleged to be owned by plaintiff, and if through proxies, the period during which said proxies were held and by whom.

27. Upon what facts does plaintiff base her [258] conclusion that any demand upon the stockholders to be effective would first require an expensive and prolonged struggle with said adverse Boards of Directors and persons to wrest control of all the voting shares of stock of defendant Transamerica Corporation from them, as alleged in paragraph XLIII (p. 37, lines 17-20).

28. Upon what facts does plaintiff base her conclusion that such a struggle would also be a futile and idle act, as alleged in paragraph XLIII (p. 37, lines 20-21).

29. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXVI, that the

matters complained of in said paragraph were “without legal right or authority” (p. 17, lines 28-29).

30. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXVI, that the salary agreement therein referred to was “pretended, fraudulent and fictitious” (p. 18, line 4).

31. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXVI, that the credit entries therein referred to were “pretended, fraudulent and fictitious” (p. 18, lines 11-12).

32. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXVI, that the profits of Bancitaly Corporation used as a basis of computation “were false, fictitious, unearned and unrealized” (p. 19, lines 9-13).

33. What facts constitute the basis of plaintiff’s conclusion appearing in paragraph XXVII, that the acts therein complained of were “without legal right or authority” (p. 19, lines 26-27).

34. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXVII, that the credit entries therein referred to were “purported, false, fraudulent and fictitious” (p. 19, line 29). [259]

35. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXVII, that the total credit and each item thereof “was and is false, fraudulent, fictitious and untrue” (p. 20, lines 13-14).

36. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVIII, that defendants Amadeo P. Giannini and L. M. Giannini, and Virgil D. Giannini, now deceased, were "unjustly enriched" by the payments in said paragraph referred to (p. 22, line 2).

37. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXVIII, that the alleged unjust enrichment was "to the serious and irremediable injury and detriment of said defendant corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders" (p. 22, lines 2-5).

38. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXIX, that the corporate transactions and acts therein referred to were "wholly and entirely concealed" (p. 23, line 8).

39. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXI, that the matters therein complained of were "without legal right or authority" (p. 24, line 4).

40. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXII, that the matters therein complained of were done "without legal right or authority" (p. 24, lines 23-24).

41. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXII, that the defendants therein referred to were "unjustly enriched" (p. 25, line 20).

42. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXII,

that said alleged [260] unjust enrichment was “to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities” (p. 25, lines 20-23).

43. What facts constitute the basis of plaintiff’s conclusion appearing in paragraph XXXV, that the transaction therein complained of was “without legal right or authority” (p. 27, line 18).

44. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXV, that the loans and advances therein referred to were not “in the usual course of business” (p. 28, lines 9-10).

45. What facts constitute the basis of plaintiff’s conclusion appearing in paragraph XXXVI, that the defendants therein mentioned and each of them was “unjustly enriched” (p. 29, line 11).

46. What facts constitute the basis of plaintiff’s conclusion appearing in said paragraph XXXVI, that said alleged unjust enrichment was “to the serious and irremediable injury and detriment of defendant Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders” (p. 29, lines 13-16).

47. What facts constitute the basis of plaintiff’s conclusion appearing in paragraph XXXVII, that the matter therein complained of was “without legal right or authority” (p. 29, line 22; p. 30, line 24).

48. What facts constitute the basis of plaintiff’s conclusion appearing in paragraph XXXVIII, that

the defendants therein referred to were and each of them was "unjustly enriched" p. 31, line 16).

49. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXVIII, that said alleged [261] unjust enrichment was "to the serious and irremediable injury and detriment of the defendant, Transamerica Corporation, and its corporate subsidiaries, departments, instrumentalities and shareholders" (p. 31, lines 16-19).

50. What facts constitute the basis of plaintiff's conclusion appearing in paragraph XXXIX, that the matters in said paragraph complained of were done "without legal right or authority" (p. 31, line 30).

51. What facts constitute the basis of plaintiff's conclusion appearing in said paragraph XXXIX, that the said matters were "to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, its corporate subsidiaries, departments, instrumentalities and shareholders" (p. 32, lines 12-14).

52. Who called plaintiff's attention on April 27, 1939, to the proceeding pending before the Securities and Exchange Commission and the order of said Commission made therein on November 22, 1938, and released on November 25, 1938, as alleged in paragraph XLI of said second amended complaint (p. 34, line 7 to p. 35, line 5); what was the relationship of said informant to plaintiff, and how long had such informant held such relationship to plaintiff.

53. Why was plaintiff's attention not called to said order of November 22, 1938 earlier than April 27, 1939.

54. Why did plaintiff not learn of said order on November 25, 1938, when the same was released.

55. Whether as alleged in paragraph XIX, all the defendants and all the persons named in paragraph XXIII of said second amended complaint conspired and agreed one with the other as in paragraph XIX alleged, or whether some of them were not conspirators but mere puppets, or were neither conspirators nor puppets but merely failed to discover the alleged wrongs, or having [262] discovered the alleged wrongs failed to take action, as alleged in paragraphs XXIV and XXV of said second amended complaint.

56. Which of the defendants and persons mentioned in said second amended complaint were conspirators, which were puppets but not conspirators, which were neither conspirators nor puppets but failed to discover the alleged wrongful acts complained of, and which, being neither conspirators nor puppets, having discovered the alleged wrongful acts failed to take action, as alleged in paragraphs XIX, XXIV and XXV of the second amended complaint.

57. What facts constitute the basis of plaintiff's conclusion appearing in paragraph II of the second amended complaint, that Bank of America National Trust & Savings Association, a national banking association, and the other corporations thereafter named are or were departments and instrumentali-

ties of defendant Transamerica Corporation (p. 3, line 6 to p. 4, line 2).

58. During what periods of time was the capital stock of the corporations referred to in said paragraph II as "subsidiaries, departments and instrumentalities" of defendant Transamerica Corporation, owned by defendant Transamerica Corporation, and what proportion of the stock of each was so owned by Transamerica Corporation.

59. To the extent that the same is not disclosed in paragraphs II, XXXIV and XXXVI, of what state is each of said corporations a resident.

60. Whether all the directors named as defendants and John M. Grant conspired and confederated, as alleged in paragraph XIX (p. 7, lines 14-22), or whether some of them were not conspirators but mere puppets, as alleged in paragraph XXIV (p. 16, line 32 to p. 17 line 4), or were neither conspirators nor puppets but merely failed to discover the alleged wrongs, or having discovered the alleged wrongs failed to take action, as alleged in [263] paragraph XXV (p. 17, lines 15-24).

61. Which of the defendants and persons mentioned in said second amended complaint were conspirators, which were puppets but not conspirators, which were neither conspirators nor puppets but failed to discover the alleged wrongful acts complained of, and which, being neither conspirators nor puppets, having discovered the alleged wrongful acts failed to take action, as alleged in paragraphs XIX, XXIV and XXV of the Second Amended Complaint.

62. What was the total amount of issued and outstanding shares of capital stock of Transamerica on the date of the commencement of this action as contrasted with the 57 shares owned by plaintiff, as set forth in paragraph III of the Second Amended Complaint (p. 4, lines 4-9).

63. What were the pretended, fraudulent and fictitious liabilities of Bancitaly Corporation (other than the salary agreement) mentioned and referred to in paragraph XXVI of the Second Amended Complaint (p. 18, lines 1-3).

64. Whether at the time defendants and persons mentioned in said paragraph XXVI caused Transamerica, its subsidiaries, departments and instrumentalities, to appear to assume its own certain alleged pretended, fraudulent and fictitious liabilities of Bancitaly Corporation, including a certain alleged pretended, fraudulent and fictitious salary agreement, any of said defendants and persons knew that said salary agreement was pretended or fraudulent or fictitious and, if so, which of said defendants and persons had such knowledge.

65. To what extent were the credit entries referred to in paragraph XXVII (p. 20, lines 7-28) of said Second Amended Complaint in excess of the actual and true net profits of Bancitaly Corporation or Transamerica Corporation.

66. Wherein did the amount credited to Amadeo P. Giannini, L. M. Giannini and Virgil Giannini, not truly and correctly [264] represent five per cent of the actual and true net profits of said corporation and its corporate subsidiaries for said period,

as alleged in paragraph XXVII (p. 20, lines 7-17) of said second amended complaint, and wherein was the said salary computed upon false, fictitious, unearned and unrealized profits, and to what extent was it so computed, as alleged in paragraph XXVII (p. 20, lines 17-20).

67. To what extent, if any, did the amount of \$3,700,000.00 alleged to have been paid to defendant A. P. Giannini and others, alleged in paragraph XXVIII (p. 20, line 30 to p. 21, line 19), exceed 3% of the actual and true net profits of Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, as alleged in paragraph XXVII (p. 20, lines 7-28).

68. Wherein the records and books of account kept and maintained by Transamerica Corporation were manipulated by an involved, intricate and complex system of accounting, as alleged in paragraph XXIX (p. 22, lines 24-27) of said second amended complaint, and how the said system of accounting was in conflict with the usual, customary and proper and recognized principles of the science of accounting, and what were the false, misleading, untrue and fictitious names and designations under which payments and disbursements to defendant Amadeo P. Giannini, as alleged in said paragraph XXIX (p. 23, lines 3-8) were covered, disguised and concealed; and what was the knowledge and understanding of the plaintiff with respect to accounting.

69. How and in what manner was the transfer and use of corporate funds and assets of defendant

Transamerica Corporation, its corporate subsidiaries, departments and instrumentalities, disguised, camouflaged, covered and concealed on the books of Transamerica Corporation, its subsidiaries, departments and instrumentalities, and wherein were the records false, fictitious or misleading, as alleged in paragraph XL of said second amended [265] complaint (p. 33, lines 8-15).

The foregoing motion will be made upon the ground that the second amended complaint lacks definiteness in the particulars specified and is defective in that regard, and that the details desired by defendant are necessary to enable him properly to prepare his responsive pleadings and to prepare for trial.

MOTION TO STRIKE OUT THE ENTIRE SECOND AMENDED COMPLAINT

IV. For an order striking the entire second amended complaint from the files for all the reasons set forth in subdivisions (f) and (g) of the foregoing Motion to Dismiss.

MOTION TO STRIKE OUT DESIGNATED PORTIONS OF THE SECOND AMENDED COMPLAINT

V. In the alternative, and without prejudice to the foregoing motion to strike out the entire second amended complaint, for an order striking the following matters from the second amended complaint:

1. All of paragraphs XXVI, XXVII, and all the allegations of paragraph XXVIII to and in-

cluding line 27, page 21, of the second amended complaint, in which are set forth transactions by and with Bancitaly Corporation and showing payments made on salary or compensation to A. P. Giannini prior to the year 1938.

The foregoing motion will be made upon the ground that the matters above specified are redundant, immaterial and impertinent as to this defendant, and are barred by the statute of limitations of actions of the State of California, and by the laches of plaintiff.

TANNER, ODELL & TAFT,
By ROBERT A. ODELL

Attorneys for Defendant Herbert E. White. [266]

The address of said attorneys for Herbert E. White is:

1011 Van Nuys Building,
210 West Seventh Street,
Los Angeles, California.

NOTICE OF MOTION

To Vincent A. Marco, Esq., Percy V. Clibborn, Esq., Homer N. Boardman, Esq., and Joseph A. Ruskey, Esq., Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before this court (Honorable Harry A. Hollzer, District Judge), at court room No. 2, Post Office and Federal Courts Building, City of Los Angeles, California, on the 1st day of October, 1942, at 10:00 o'clock A. M.

of that day, or as soon thereafter as counsel can be heard.

You Will Further Take Notice that all of said motions will be made upon the files and records herein, including the Reporter's Transcript of the proceedings herein had on June 23, 24 and 25, 1942, said motions and this notice, and the affidavits relating respectively (1) to the delivery to counsel for plaintiff herein of a copy of the letter of December 9, 1931, more particularly described in paragraph (f) of the foregoing motion to Dismiss, and (2) to the mailing of said letter in December, 1931, which affidavits are annexed to the motions of defendants A. H. Giannini, et al., made in respect to the second amended complaint.

Please Take Further Notice That defendant Herbert E. White will rely upon Points and Authorities in support of said motions, a copy of which is herewith served upon you.

(Affidavit of Service by Mail.)

TANNER, ODELL & TAFT,
By ROBERT A. ODELL

Attorneys for Defendant Herbert E. White.

[Endorsed]: Filed Sep. 15, 1942. [267]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT TRANSAMERICA
CORPORATION, A CORPORATION

Comes now the defendant Transamerica Corporation, a corporation, appearing for itself alone and not on behalf of any other defendant or defendants herein, and filing this, its Answer to the Second Amended Complaint on file herein, defends on the following grounds:

First Defense

The Second Amended Complaint fails to state a claim against this answering defendant upon which relief can be granted.

Second Defense

The Second Amended Complaint fails to state a claim on behalf of this answering defendant upon which relief can be granted. [268]

Third Defense

The Second Amended Complaint fails to state a claim against any other defendant or defendants herein upon which relief can be granted to this answering defendant.

EDMUND NELSON

Attorney for Defendant Transamerica Corporation
Address: Room 410 Bank of America Building,
650 South Spring Street, Los Angeles, California.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Sept. 15, 1942. [269]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 16th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

No. 1490-H Civil

ORDER GRANTING MOTIONS TO DISMISS

For the reasons set forth in the memorandum of conclusions this day filed, it is ordered that each and all of the motions filed on behalf of the respective defendants to dismiss the second amended complaint be granted. It is further ordered that on or before June 1, 1943, plaintiff may file application for leave to file a third amended complaint, provided that such application have attached thereto her proposed further amended pleading, and also be accompanied by a memorandum of supporting points and authorities, provided further that at least ten days notice shall be given of the hearing of such application. [271]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

Judge Hollzer's Calendar.

The present case constitutes what is generally designated as a stockholder's derivative suit. Plaintiff is the owner of a small number of shares of the corporate defendant named Transamerica Corporation, hereinafter referred to as Transamerica. The number of defendants is quite large, totalling eighty-one in all. Of these forty-six are sued by their true names, one being designated in four different capacities, and two others being each sued in two different capacities. The remaining thirty-five defendants are designated under fictitious names.

The matters discussed herein arise upon several motions which various groups of defendants have interposed against the second amended complaint. Each group of defendants has filed a motion to dismiss, a motion to separately state causes of action in separate counts, a motion for a more definite statement or for a bill of particulars, and a motion to strike the entire complaint. In addition, certain of these defendants have filed a motion to strike out certain [272] designated portions of the complaint.

This second amended complaint was filed by leave of court, granted at the close of quite an extended oral argument upon substantially similar motions directed against a first amended complaint. A clearer understanding of the legal questions requiring determination will be afforded by referring to certain portions of the discussion which took place

during the aforementioned oral argument, when the first amended complaint was under attack. Upon that occasion, it was pointed out that in said earlier complaint plaintiff had set forth in one and the same count allegations to the effect that as the result of sundry separate and distinct transactions, frauds had been perpetrated against Transamerica. Respecting such former pleading it was argued that one of the transactions therein complained of was alleged to have arisen out of a certain salary contract entered into prior to the organization of Transamerica between one of the defendants and a previously formed corporation and was described as involving the fraudulent disbursement of the funds of such earlier corporation pursuant to the terms of said contract; that another of the transactions there attacked was described as involving a fraud whereby Transamerica had assumed the liabilities of said earlier corporation, including the obligations of said contract and pursuant to the terms thereof had fraudulently disbursed various sums out of its own funds to the same defendant during a period both antedating the organization of Transamerica and also extending during approximately the first year of its existence; that a third transaction there complained of was described as involving a fraud whereby during a still later period and under the terms of the last mentioned contract Transamerica had [273] improperly disbursed additional sums out of its own funds to the same defendant; that still a further transaction there complained of was described as involving a fraud whereby, during the

years 1932 to 1938 inclusive, three of the defendants together with another individual who had died prior to the commencement of this suit, and whose personal representative was included as a co-defendant, had caused a certain co-partnership to be organized, under the name of Walston & Co., which partnership had been composed of eight of the defendants together with said decedent—and whereby two of the aforementioned partner defendants had caused, and the co-defendant directors of Transamerica knowingly had permitted, Transamerica to divert all of the latter's security brokerage business to said co-partnership and to pay from its funds substantial sums as brokerage fees for services with respect to brokerage business so diverted and also to pay other substantial sums for use as capital for said co-partnership, all of which sums were divided among the aforementioned three defendants and said fourth person, since deceased; that yet another transaction there complained of was described as a fraud whereby two of the aforementioned defendants together with a third person since deceased, whose personal representative was included as a co-defendant, caused Transamerica to advance large sums of money to them, which sums had been used by them to acquire the controlling interest in the capital stock of a certain corporation and for the further purpose of enabling the latter corporation to engage in speculative stock operations, that such operations had been carried on during the years 1933 to 1936 inclusive, resulting in large [274] profits to said corporation and which profits were

paid to the aforementioned two defendants and said third person since deceased; that again still another transaction there complained of was described as a fraud whereby the aforementioned two defendants and said third person since deceased had organized a certain secret trust syndicate referred to as the Mallory and Smith Trust, that said two defendants had caused, and the co-defendant directors of Transamerica knowingly had permitted, Transamerica to advance large sums to said trust syndicate which had employed the same for speculative stock operations resulting in substantial profits, which in turn had been paid to two said defendants and said third person since deceased during the years 1933, 1934 and 1935; and that finally yet another transaction there complained of was described as a fraud whereby the aforementioned two defendants caused Transamerica to expend large sums of money in repayment of substantial losses and expenses incurred in connection with said speculative stock operations.

During the course of the aforementioned argument the court commented in part as follows:

“For example * * * I see no basis upon which any decision relative to the so-called contract, salary contract transaction, will have the slightest bearing in determining the legality or illegality of the so-called Walston and Company venture, and vice versa.”

The Court further pointed out that in the first amended complaint the plaintiff had charged that

several separate and distinct ventures were illegal and had caused [275] detriment to Transamerica and its stockholders. Another observation on the part of the court was to the effect that plaintiff should be allowed to file another amended bill, wherein some of the transactions complained of might be segregated into different counts.

Toward the close of that argument, and in reply to the court's suggestion to the effect that such matters as the so-called salary transaction, the Walston & Company transaction and the Mallory Trust transaction be treated in separate counts, plaintiff's counsel at first indicated that he would like to present a further memorandum on that point.

During this same discussion opposing counsel urged that an inspection of the minutes and other corporate records of Transamerica would disclose that during the latter part of 1931 and the early part of 1932 a majority of the board of directors of Transamerica were hostile to those particular defendants who were charged in the complaint as being the instigators of and the principals in the various allegedly fraudulent transactions complained of and had taken affirmative action against those defendants. Hence they pointed out that in view of such facts it would ultimately be incumbent upon plaintiff to overcome the charge that the present suit is barred by laches. Accordingly, they argued that in view of the great length of time which had elapsed, the fact that most of the defendants had ceased to be directors of Transamerica for many years past, the further circumstance that

two of the so-called principal defendants were dead, and likewise since plaintiff's counsel conceded that if this case were brought to trial it would entail bitterly contested, protracted hearings wherein the evidence would consist [276] mainly of the conflicting testimony of witnesses relying almost solely upon their recollection of incidents that had occurred many years ago, it was fair and proper that the complaint disclose fully the essential facts pertaining to the question of laches in order that that issue might be settled at the very threshold of the litigation.

To the latter contention plaintiff's counsel responded in substance that while he agreed with the same in principle he was not then prepared to say how he would treat this point in a complaint.

Somewhat later in the argument plaintiff's counsel stated:

“Now, as I said before, we have no objection to separating our complaint into counts on the various statements of the claims, but it occurs to me that in doing it we should have the advantage of knowing just what the court's decision is on the other questions, * * * ”

In explanation of what was meant by the expression, “other questions”, counsel added that he referred principally to the contention made on behalf of the defendants to the effect that the complaint failed to allege facts sufficient to relieve the plaintiff from the necessity of appealing to the stockholders to secure action on behalf of Transamerica be-

fore filing the present lawsuit. Whereupon the court announced that its ruling upon that point would be reserved until after the filing of a further amended complaint, and that while the court's tentative view then was that this contention was not sound, nevertheless, there was no reason why in such further amended pleading the plaintiff should not include anything she desired to add [277] in justification for not appealing to the stockholders.

The minutes of the court disclose that at the conclusion of that oral argument an entry was made reading as follows:

“The court makes a statement re its present views. It is ordered that the plaintiff serve and file an amended complaint within sixty (60) days and that the defendants have thirty (30) days thereafter to plead thereto.”

Thereafter plaintiff filed a second amended complaint together with a memorandum of points and authorities in support thereof. Just as in the case of the previous complaint, plaintiff has incorporated all of the matters complained of in a single count.

In justification of this type of pleading plaintiff's counsel, during the oral argument upon the pending motions, asserted that subsequent to the entry of the order granting leave to file a second amended complaint certain matters had come to their attention which had induced them to adopt a different legal theory respecting this litigation, and it was accordingly upon this new theory that the present

complaint had been drawn. Such different theory, counsel explained was to the following effect.

The first amended complaint was based upon the proposition that two of the defendants and a third person since deceased (whose legal representative was joined as a defendant) had conspired to acquire control of Transamerica and its affairs, that pursuant to such conspiracy, they had selected its directors, dominated its affairs and caused its directors to commit various breaches of their trust or [278] fiduciary obligations and that in furtherance of such conspiracy various overt acts had been committed at the time, in the manner and in the particulars therein pleaded, causing damages to Transamerica in the respective amounts therein alleged. On the other hand, the second amended complaint was prepared upon the theory that all of the persons who at any time had served as directors of Transamerica had conspired to commit the aforementioned breaches of their trust or fiduciary obligations, that in furtherance of such conspiracy certain overt acts had been committed at the times, in the manner and in the particulars therein pleaded, causing damages to Transamerica, its subsidiaries and departments in the respective amounts therein alleged, and that such of the defendants as had never served as directors were joined upon the theory that they had aided their co-defendants in committing one or more of the alleged breaches of trust.

It is the contention of plaintiff's counsel that but a single conspiracy has been pleaded in the second

amended complaint; that all of those directors and any others who at any time allegedly entered such conspiracy are equally liable regardless when, if at all, they served as directors of Transamerica; also, that it is immaterial when the different alleged overt acts were committed or when damages resulted therefrom; and that even though it may be pleaded that different defendants, acting either as directors or otherwise, entered the alleged conspiracy at different times, nevertheless, according to the allegations of said complaint they are charged with having adopted the entire, single, illegal scheme, and hence all defendants are equally liable [279] for all wrongs committed, including not only those perpetrated before they became directors or before they otherwise aided the alleged conspiracy, but also for all the various wrongs asserted to have been committed after they had ceased to be directors of Transamerica, or otherwise had terminated their connection with the enterprises claimed to have been involved with said conspiracy.

Examining the second amended complaint, it will be observed that the first eighteen paragraphs consist of more or less performative recitals either identifying the parties to the litigation or otherwise pleading the matters which would entitle this court to take jurisdiction of the cause.

Paragraph XIX in substance charges that on or about October 11, 1928, all the defendants, including those particular individual defendants who at any time served as directors of Transamerica, together with the two former directors who had died

prior to the commencement of the suit, and in addition the forty-four other persons not sued as defendants but who at one time or another had also served as directors, conspired to control, operate and use Transamerica, its subsidiaries and departments, for their own benefit, by wrongfully appropriating its assets and otherwise using their official positions with Transamerica, and the confidential and special knowledge gained thereby, to the detriment of the latter corporation, its subsidiaries, etc. It is further alleged in the same paragraph that as a part of said conspiracy the defendants had said other persons not sued confederated to obtain and maintain control of the outstanding voting shares, also to select and dominate the [280] members of all its boards of directors and all its principal officers, that in addition the defendants and said other persons conspired that, in the event any persons elected as such directors were not members of said conspiracy, they would at all times be entirely dominated by the defendants and said other persons to the extent that such other directors would be the dummies of the defendants and said other persons, and in the performance of their official duties would exercise no independent judgment, but would respond entirely to the will of the defendants and said other persons; and also that in the event that the defendants and said other persons for any period of time should fail to maintain control of the voting shares of Transamerica and of the election of its directors, nevertheless, said conspiracy would not terminate but that the defendants and

said other persons would attempt to regain control of such voting stock and if successful then said conspiracy would continue indefinitely.

In Paragraphs XX to XL inclusive it is alleged that from time to time during a period covering many years the defendants and said other persons engaged in a series of transactions for the purpose of effecting the objects of said conspiracy. Particularly, it is charged in Paragraph XXI that during all times mentioned in the second amended complaint up to the filing thereof, the defendants and said other persons obtained and exercised exclusive control of all the outstanding voting shares of stock of Transamerica and thereby elected all members of its several Boards of Directors and controlled and dominated its business policies and affairs. [281]

Paragraph XXII discloses that through such stock control, of the forty-six designated by their true names, thirty-three defendants served at one time or another during the period involved herein as directors of Transamerica. Two others of such forty-six have been sued as the legal representatives of decedents who also at one time had been directors of that corporation. None of the remaining defendants appears ever to have held such position or otherwise to have been officially connected with that corporation.

Of the aforementioned thirty-three, sixteen had ceased to be directors by February, 1932 and thereafter had no further official connection with Transamerica, while another remained a director only about two months, namely from February to April,

1932. At that time, as pointed out in the herein-after mentioned order of the Securities and Exchange Commission issued in November, 1938, a change took place in the management. Of the remaining sixteen, one was a director only about eleven months, namely from April, 1932, until March, 1933, another held that position about nineteen months, to-wit, from April, 1932 until November, 1933, while five others served as directors from February or March, 1932, until sometime in 1939, seven have been directors from February or March, 1932 until the filing of this suit, while only two have served in that capacity throughout the entire period involved in this litigation.

In Paragraph XXIII there is set forth a list of forty-four other persons, none of whom is sued herein, but all of whom are also alleged to have served at one time or another as directors of Transamerica, and who likewise [282] are described as having been among the co-conspirators. Their election as directors is claimed to have been effected similarly through the aforementioned stock control.

Of these forty-four other persons, it is asserted that one was a director but a single day, to-wit on February 15, 1932, five others held such position barely nine days (February 14 to 24, 1932), two others were directors only nineteen or twenty days (one on March 26, and again from September 4 to September 22, 1931, and the other from April 6, to April 26, 1932), three more served but 27 or 28 days (one from September 4 to October 1, 1931, and the other two on March 26 and again from September

4 to October 1, 1931), also seven others were directors hardly two months (February to April, 1932), eight more acted as such but approximately five months (from about September, 1931 to February, 1932), still another was a director only six months (from March to September, 1931), yet another barely eight months (January 20 to September, 1929), also another served hardly nine months (March to December, 1940), also one was a director but ten months (April, 1932 to February, 1933), yet another was elected to such office only about twenty days prior to the filing of this suit and held the same approximately one year (March, 1941 to March, 1942), still another held such position barely thirteen months (January 19, 1929 to February, 1930), again two more served as directors only about one year and seven months (one from February, 1930 to September, 1931, and the other from July, 1930 to February, 1932), also another was a director barely one year and eight months January, 1930 to September, 1931), again two more held such positions [283] approximately two years and one month (January, 1930 to February, 1932, while two others served in that capacity only two years and four months (May, 1929, to September, 1931), still two others were directors barely two years and eight months (January, 1929 to September, 1931), again another served about two years and nine months (May, 1929 to February, 1932) while of the remaining two, one has been a director from March, 1940 to the date of the filing of the present suit and the other has served in such capacity from March, 1932 until the same time.

Thus upon the face of the second amended complaint it appears that during the period involved in this litigation Transamerica and its subsidiaries had been under the management of several different boards of directors.

In Paragraphs XXIV and XXV it is asserted that each individual director of Transamerica who did not become a member of said conspiracy was a dummy director and at all times was controlled and dominated by the defendants and said other persons to the extent that in the performance of official duties and in all corporate acts they exercised no independent judgment, but responded to the will of the defendants and said other persons; that likewise such directors of Transamerica who did not become members of said conspiracy or serve as dummy directors, either failed to discover any of the wrongful acts complained of, or, having discovered the same, failed at all times and in disregard of official duties, to take action or cause action to be taken to redress or prevent the continuance of such wrongs. [284]

Paragraphs XXVI to XXIX inclusive charge in substance that among the overt acts done in carrying out such conspiracy the defendants and said other persons, acting through the board of directors of Transamerica on or about May 25, 1929 caused the latter corporation to acquire all of the capital stock and all of the assets, and also to assume the liabilities, of another corporation know as Bancitaly Corporation; that among such liabilities was a certain salary agreement which in 1927 had been en-

ferred into between Bancitaly Corporation and the defendant A. P. Giannini, and which provided that for the services to be rendered by him as president of the latter corporation, beginning January 1, 1927, he should be paid five percent of its net profits per annum with a guaranteed minimum of \$100,000. In that connection said pleading avers that the last named corporation had been operated and controlled by defendants A. P. Giannini, P. C. Hale and James A. Bacigalupi and others not named, and that the aforementioned salary agreement was fraudulent and fictitious. It is further averred that among the liabilities thus assumed were certain allegedly fictitious credit items entered between April 13, 1927 and May 25, 1929 upon the books of the last named corporation in favor of defendants A. P. Giannini and L. M. Giannini and one V. D. Giannini (now deceased) in sums aggregating approximately \$925,000.

It is further stated that acting through the Board of Directors of Transamerica the defendants and said other persons, between April 5, 1929 and the end of that year, caused to be entered on the books of said corporation, its subsidiaries and departments, as liabilities under the provisions of the aforementioned salary agreement, certain [285] allegedly fictitious credits in favor of said last two named defendants and said V. D. Giannini (now deceased), in amounts aggregating not less than \$3,700,000.00. It is also there charged that between April 5, 1929 and January 1, 1939 the defendants and said other persons, acting through their several

boards of directors of Transamerica, illegally caused said corporation and its subsidiaries, etc. to pay to said last three named persons, on account of the aforementioned credits, varying amounts aggregating \$3,700,000.00, and that of the latter sum certain particular installments totalling \$1,271,-647.01, were paid to said parties in each of the years 1930 to 1939 inclusive.

Here it should be noted that, although according to the complaint Bancitaly Corporation had been owned, dominated and controlled by only three of the defendants, to-wit, Hale, Bacigalupi and A. P. Giannini, up until about May 25, 1929, including the time when the aforementioned salary agreement was entered into, and also the period during which it is claimed that false entries were made upon the basis of said salary agreement in the books of the latter corporation thereby crediting the defendants A. P. Giannini and L. M. Giannini and said V. D. Giannini (now deceased) with sums aggregating \$925,000, nevertheless, all of the defendants together with all of the forty-four other persons listed as having been directors at one time or another of Transamerica are accused of wrong doing because of acts done in conformity with the provisions of said agreement.

While the plaintiff charges that all of the defendants and said forty-four other persons committed fraudulent and illegal acts—recitals which are but legal conclusions—her pleading fails to set forth with particularity the ultimate facts and [286] cir-

cumstances constituting the alleged fraud and illegality.

What, if anything, the defendants, other than the three last above named, or any of these forty-four other persons had to do with the making of said salary agreement, in what particulars the acts of those defendants and the forty-four other persons who were directors of Transamerica at the time the latter assumed liability under said salary agreement constituted fraud or other wrongful conduct, whether plaintiff claims that all of the defendants and all of said forty-four other persons knew that the credit entries made between April 5, 1929 and the end of that year in favor of defendants A. P. Giannini, L. M. Giannini and V. D. Giannini (now deceased), were false and fraudulent or fictitious, or whether plaintiff seeks to charge that because some of the defendants and other persons possessed such knowledge, particularly those who knew of these book entries or at least attended meetings of the board of directors of Transamerica during the period last mentioned, therefore all of the defendants and all of said forty-four persons may be charged as a matter of law with having caused such entries to be made upon the books of said corporation, its subsidiaries, etc., the complaint fails to disclose. Instead, much is left to conjecture.

The foregoing series of alleged wrongs may be described as having stemmed from or as being in some way connected with the alleged fraudulent salary agreement. It will also be observed that many alleged wrongful acts are charged in language

rather general though sweeping in character. Likewise it is claimed that these alleged wrongs were perpetrated over a period comprising many years, during [287] which not only one or another of several different boards of directors of Transamerica presumptively controlled the management of that corporation, but in addition what might be termed the primary wrong in this particular series appears to have been committed by the management of a different and earlier corporation, with which virtually all but very few of the defendants had nothing to do.

Further illustrating the multiplicity of transactions complained of we find that in paragraphs XXX to XXXIII inclusive plaintiff avers in substance that on or about December 17, 1932 at a time when Transamerica, its subsidiaries, etc., were engaged in a profitable investment and brokerage business, the defendants and said other persons, for the purpose of enriching themselves, particularly the defendants A. P. Giannini, L. M. Giannini and Claire Giannini Hoffman, and said V. D. Giannini (now deceased), and acting through defendant L. M. Giannini and said decedent, caused the defendant co-partnership of Walston and Company to be organized; that thereafter, during each of the years 1933 to 1938 inclusive, and acting through each of the several different boards of directors of Transamerica serving at the particular period involved, the defendants and said other persons caused Transamerica, its subsidiaries, etc. to

divert all of its investment and brokerage business to [288] said Walston and Company for the purpose of enriching themselves, particularly the last four named parties; and that during said last mentioned period, acting through each of the several different Boards of Directors of Transamerica, serving at the particular period involved, the defendants and said other persons caused Transamerica, its subsidiaries, etc. to disburse from the funds thereof to said Walston and Co. large sums as brokerage fees in connection with the business diverted as aforesaid and, in addition, sums for use as capital for said Walston and Company, the same aggregating about \$548,000, all of which sums were thereafter distributed by said Walston and Company to said last four named parties.

Here too, it may be pointed out that according to the [289] pleader the series of so-called Walston and Company frauds extended over a period of many years, and that during those years each of the several different boards of directors of Transamerica which happened to be serving at the particular time involved caused one or more of said acts to be committed. In this connection it should be added that all of the members of the co-partnership firm of Walston and Company, including the last four named parties, are listed among the defendants herein.

Still another series of alleged wrongful acts is found set forth in Paragraphs XXXIV to XXXVI inclusive. Here plaintiff has alleged that at sometime during 1932 all the defendants and

said forty-four other persons organized a certain private trust syndicate, suing Charles J. Smith and Margaret Mallory as trustees thereof, to engage in speculative operations in the stock of Transamerica and other securities; that sometime in the year 1932 all of the defendants and said forty-four other persons, acting through the then Board of Directors of Transamerica, caused the latter corporation, its subsidiaries, etc. to advance from the funds thereof amounts aggregating not less than \$1,500,000 to the defendants A. P. Giannini and L. M. Giannini and said V. D. Giannini (now deceased); that these three used such funds to acquire the controlling interest in the stock of another corporation (originally known as Bankitaly Mortgage Company but later its name was changed to Pacific Coast Mortgage Company); that in addition all defendants and said forty-four other persons caused Transamerica, its subsidiaries, etc. to advance from the funds thereof into the treasury of Pacific Coast Mortgage Company [290] amounts aggregating not less than \$1,500,000, which were employed by the latter corporation during each of the years 1933 to 1938 inclusive in carrying on speculative stock operations; also that such advances were made to further the personal interests of the three persons last named; that during the years last mentioned said Pacific Coast Mortgage Company collected as the result of such speculative operations profits aggregating not less than \$2,000,000 which from time to time were distributed to the three persons last named; and that all of

the alleged wrongs last enumerated were accomplished secretly and were concealed through purported loans and other transactions to secret agents, including one A. O. Stuart and A. P. Giannini Company, a corporation.

Here it should be pointed out that the allegations embraced within paragraphs XXXIV to XXXVI are so phrased as to leave uncertain whether plaintiff claims that the total of all the advances made from the funds of Transamerica with respect to the so-called Pacific Coast Mortgage Company dealings amounted to the sum of \$1,500,000 or the sum of \$3,000,000.

An additional series of allegedly wrongful acts is described in paragraphs XXXVII to XXXVIII. It is there averred that during each of the years 1933 to 1936 inclusive all of the defendants and said forty-four other persons, acting through each of the several different boards of directors of Transamerica serving at the particular period involved, caused that corporation, its subsidiaries etc. to advance from the funds thereof various amounts aggregating not less than \$3,000,000 to said trustees Smith and Mallory for use [291] as capital in conducting the business of the aforementioned trust syndicate; also that such capital was employed by said trustees and the beneficiaries of said trust syndicate for speculative operations in the stock of Transamerica and in other securities, resulting in large profits to said trust syndicate aggregating not less than three hundred thousand dollars; that from

time to time such profits were distributed, to the detriment of Transamerica, its subsidiaries, etc., in the amount last stated; and that such advances were consummated secretly and were concealed through purported loans and other transactions to secret agents. Here likewise the pleading is indefinite, that is, it is not clear whether plaintiff contends that the aforementioned profits were divided among the particular three or four persons who are repeatedly singled out in the complaint or that such profits were distributed among all of the defendants and all said forty-four other persons.

Still further illustrating the multiplicity of transactions complained of, we find that in Paragraph XXXIX plaintiff charges that at some time during each of the years 1932 to 1937 inclusive, all of the defendants and said forty-four other persons, acting through each of the several different boards of directors of Transamerica serving at the particular period involved, caused that corporation, its subsidiaries, etc. to engage in manipulating the market for the stock of said corporation, and that as a consequence Transamerica, its subsidiaries, etc. incurred expenses and sustained losses aggregating not less than \$2,250,000.

In Paragraph XL as well as in the various other portions of the second amended complaint are found recitals to [292] the effect that all of the defendants and said forty-four other persons, acting through each of the several different boards of directors of Transamerica serving at the particular period involved, caused the various corporate transactions

complained of to be kept by an intricate system of accounting, contrary to customary and proper accounting principles and beyond plaintiff's understanding, to such an extent that said transactions at all times were concealed by entries made under false, fictitious and misleading designations, also that some of the acts complained of were caused to be withheld by the same parties from the records of Transamerica, its subsidiaries etc. and to be evidenced by concealed and private agreements.

Paragraph XLI is devoted to setting forth the facts and circumstances describing how plaintiff first discovered the various alleged wrongs hereinbefore described. It is upon the allegations of that paragraph that plaintiff relies to excuse her delay in the commencement of this suit.

In substance plaintiff there asserts that at all times up until about April 27, 1939 the defendants and said forty-four other persons kept concealed from her all the corporate transactions of which complaint is made; also that during all such times she had no knowledge, information or notice concerning the same, or respecting any wrongful conduct of the defendants or of said forty-four other persons concerning their management of the business of Transamerica or its subsidiaries or departments; that she reposed complete confidence in defendant A. P. Giannini and all of the directors and officers of Transamerica and its subsidiaries, etc., until about April 27, 1939, when for [293] the first time a certain proceeding then pending before the Securities and Exchange Commission of the United

States was called to her attention. In this connection it is further alleged that thereupon she investigated said proceeding and ascertained that under date of November 22, 1938 said Commission had ordered a hearing to determine whether the stock of Transamerica should be suspended or withdrawn from certain securities exchanges by reason of false and misleading statements, which did not correctly reflect the true financial condition of Transamerica and its subsidiaries and departments; that on the date last mentioned she for the first time ascertained the matters and charges contained in the order of said Commission directing a hearing to be had respecting the same and that a copy of such order was being tendered for filing to show the nature and extent of plaintiff's first discovery of suspicious circumstances concerning the wrongs complained of.

Plaintiff further alleges that prior to April 27, 1939 she had no knowledge, information or notice concerning the aforementioned proceeding before said Commission, and did not have reason to suspect any of the defendants or other persons of wrongdoing in the conduct of the business of Transamerica, its subsidiaries etc.; also that said proceeding before said Commission is still pending, and that the matters and charges referred to in said order of said Commission were developed slowly through detailed examinations and audits of the records of Transamerica and its subsidiaries, etc. by expert accountants on behalf of said Commission, and were presented to it by the testimony of unwilling witnesses through examination of the latter by experi-

enced lawyers. [294] Finally it is therein averred that immediately after making the aforementioned discovery plaintiff proceeded to investigate and at all times ever since has continued diligently to investigate to ascertain the true and complete facts respecting the conduct of defendants and said forty-four other persons as to their management and operation of the business of Transamerica and its subsidiaries, etc., but thus far she has been unable to complete such investigation and is still proceeding therewith.

A pleading must be construed most strongly against the pleader. The presumption is that the latter has stated his cause as strongly as the facts warrant. In view of plaintiff's admission to the effect that at all times since April 27, 1939 she had continued diligently to investigate to ascertain the truth concerning the conduct of the defendants and the other directors with respect to their management and operation of the business of Transamerica, and that although she had been so engaged for a period of approximately two and a half years, nevertheless, she had been unable to complete such investigation and was still carrying on the same at the time of filing her last amended complaint, there arises at least the inference that when she does conclude such inquiry plaintiff may discover one or more of her charges to be unsupported by the facts.

The accusations made herein are of a most serious nature. The period of time involved extends over a great many years. The good name of an exceedingly large number of individuals is under attack.

Prior to the filing of the present suit two of the allegedly chief conspirators had died. Their legal representatives are included among the [295] eighty-one defendants. Since the filing of the second amended complaint one of the defendants also has died. So far as the pleading discloses only four of the present defendants are residents of this district. Where the remaining individual defendants reside, or from what distances they may be required to travel in order to attend the trial of this cause, does not appear, except that they reside in California. The principal office and place of business of Transamerica are alleged to be in the City and County of San Francisco, namely in the Northern District of this State. For aught that now appears the meetings of its directors have taken place in the latter district. Doubtless many corporate records, more or less voluminous, will need to be transported from the corporation's principal office for the purpose of the trial. The plaintiff herself claims to be a resident of the State of New York. Just why this litigation should have been filed in this District is not clear.

Under these circumstances before the defendants are subjected to the burdens, financial and otherwise, which a trial of the charges aforementioned would impose, they are entitled to be apprised with reasonable definiteness, both as to what it is claimed was their specific participation in the acts complained of, also wherein it is asserted their particular conduct constituted a violation of plaintiff's rights. In any event, plaintiff's admission as above

stated to the effect that she is still endeavoring to ascertain the truth of the charges she has made herein furnishes a most convincing ground for applying strongly against the pleader the rule that in all averments of fraud the circumstances constituting the fraud shall be stated with particularity. (See Rule 9b FRCP.) [296]

Turning now to the aforementioned order issued by the Securities and Exchange Commission under date of November 22, 1938—we find that the same embraces in substance the following matters. It is therein recited that Transamerica had registered its shares of capital stock on certain national exchanges by filing on August 7, 1937 a certain application with said exchanges and with said Commission, pursuant to Section 12 (b) of the Securities Exchange Act of 1934 as amended, and pursuant to Rule JB1 of said Commission. Said order further declares that said Commission, having reasonable ground to believe that Transamerica had failed to comply with the provisions of said Section 12 (b) as amended and of its rules, in that said applications contained false and misleading statements of material facts, including financial statements of Transamerica and its subsidiaries, which did not reflect the true financial condition thereof, all as more particularly set forth under the heading of eighteen separate items, said Commission ordered that a public hearing be held to determine whether Transamerica had failed to comply with the provisions of said Act and of its rules in the particulars set forth in said order, and

if so, to determine whether it would be necessary or appropriate to suspend or to withdraw the registration of Transamerica's capital stock on said exchanges. In addition this order designates the officer to conduct said hearing, and fixes the time and place for holding the same.

A reading of the particulars specified under said eighteen items discloses that, except as hereinafter noted, they all related to certain entries in the books and records of Transamerica or one or more of its subsidiaries, which entries purported to reflect the financial condition of said corporations as of December 31, 1936, and appeared to said [297] Commission to be false and misleading. These entries included such matters as a certain charge to "Paid-In Surplus" resulting from cancellations and redistribution of capital stock, appearing in the balance sheet of Transamerica as of December 31, 1936, which item in the Commission's opinion should have been entered as a current expense chargeable to profit and loss. Another specification pertained to alleged similar erroneous charges entered in 1934 and in 1935. Still other specifications referred to such items as excessive valuations of assets, the failure to charge off certain entries as losses, inadequacy of reserves, and like matters.

In addition said order pointed out that in the aforementioned applications Transamerica had failed to disclose that three of its then directors—one of these died prior to the commencement of this suit—constituted a "parent" of said corporation by virtue of the fact that said three directors at that time held general stock proxies empowering

them to direct the management and policies of Transamerica; and also that in said application Transamerica had failed to state that during the years 1930 to 1936 inclusive it had made disbursements in various amounts as remuneration to a certain officer and director thereof, to-wit, the defendant A. P. Giannini. Respecting the latter item, said order declared that the Commission had "reasonable grounds to believe that on January 20, 1930, the sum of \$1,400,000 was placed on the books of Bancitaly Company of America (then a subsidiary of Transamerica Corporation) to the credit of A. P. Giannini; that of this \$1,400,000 all but \$792,000 had been paid to A. P. Giannini, by September, 1931, at which time counsel for the then existing [298] management of Transamerica Corporation advised that further payment would be illegal; that thereafter subsequent to the change in management in 1932, A. P. Giannini withdrew from the balance of \$792,000 the following sums:" (here followed a list of five annual disbursements made to defendant A. P. Giannini in each of the years from 1932 to 1936 inclusive.)

It is to be noted that nowhere in the aforementioned order did said Commission declare or even intimate there was reasonable ground to believe that any of the defendants had engaged in a conspiracy or in any of the alleged wrongful acts complained of herein. On the contrary, the above quoted excerpt from said order rather would imply that said Commission believed that the management of Transamerica at least as it existed in September, 1931,

had challenged the legality of the aforementioned credits entered in favor of the defendant A. P. Giannini, also that the Commission found that in 1931 the then existing board of directors of that corporation had been hostile to and had prevented him from drawing any further sums under said credits, and further believed that it was not until some time after "the change in management in 1932" that he succeeded in withdrawing any additional sums on account of such credits.

Furthermore, in view of the fact that at the time of the filing of the second amended complaint, namely after it had been conducting its investigation over a period of about four years, said Commission had not been able to conclude the same, nor had it been able to determine whether Transamerica had failed to comply with any of the provisions of the Securities and Exchange Act or of its rules, or [299] whether it would be necessary or appropriate to suspend or withdraw the registration of Transamerica's capital stock on any of the national exchanges, it can hardly be said that said order of the Commission supports plaintiff's averment to the effect that the disclosures made in said order uncovered the alleged wrongful acts of which she complains in the present lawsuit.

Indeed the status of the proceeding before said Commission after the lapse of nearly four years as above described, and the further circumstance that the Commission's order, upon which plaintiff apparently mainly relies to justify the very long delay in the filing of the present suit, contains no recitals

supporting the charges she has made herein, rather warrants the conclusion that if the bar of the statute of limitations or of laches is to be avoided it will be necessary for plaintiff to plead other facts besides those set forth in her second amended complaint.

In the concluding paragraphs of her complaint, besides alleging she has no plain, speedy or adequate remedy at law, plaintiff has undertaken to explain why it would be futile for her to demand of the directors or of the stockholders of Transamerica to institute action to redress the alleged wrongs on account of which she seeks relief, in other words, to justify her omission to make any such demand. Respecting such omission, plaintiff has charged that all those who had been members of the several different boards of directors of Transamerica during any of the periods mentioned in her complaint, including those serving at the time of the commencement of this suit, have been sued as defendants or otherwise have been accused of committing the alleged wrongs pleaded therein, also that at all such times the defendants and said forty-four other persons held and exercised [300] control of the voting share of stock of Transamerica, that knowing such facts plaintiff had made no demand on the board of directors of that corporation or of its shareholders to institute such action, as such a suit to be effective must be directed against all of the defendants and the forty-four other persons named in the complaint, and accordingly that such a demand would be a futile and idle act. In that same connection, it is further

asserted that the outstanding shares of stock of Transamerica are held by approximately 200,000 persons residing in substantially all of the states and territories of the United States and in numerous foreign countries, that such a demand upon the stockholders to be effective would require an expensive and prolonged struggle with adverse boards of directors and persons to wrest control of such voting shares from them, and that such struggle would be a futile and idle act.

By the prayer of her complaint plaintiff seeks a decree declaring a trust relationship between each of the defendants and herself and also between Transamerica and the defendants; also that all defendants render an accounting of their dealings with the assets etc. of Transamerica and of their acts as directors and officers thereof concerning the transactions complained of; that upon such accounting judgment be entered against each of the defendants in the amounts to which Transamerica and the plaintiff may be entitled, but not less than the sum of \$8,798,000, together with an attorney's fee and costs, plus such other relief as may be equitable.

Analyzing this pleading in the light of the prayer thereof it would appear that of the \$8,798,000 sought to be recovered herein, the sum of \$3,700,000 is claimed to represent losses sustained as the result of payments made by [301] Transamerica, its subsidiaries, etc., pursuant to the provisions of the so-called salary agreement, also the further sum of \$548,000 is described as constituting the damages suffered on account of what may be termed the

Walston and Company series of transactions, likewise the further amount of \$2,000,000 is asserted to reflect the damages resulting from the Pacific Coast Mortgage Company dealings, while the sum of \$300,000 is referred to as constituting the damages arising out of the so-called Smith and Mallory trust syndicate series of transactions, and the balance of \$2,250,000 is charged as representing the losses resulting from stock market manipulations in which Transamerica and its subsidiaries purportedly engaged.

The pleading we are here considering is long and prolix, comprising approximately thirty-seven pages. It is replete with surplusage and repetitions as well as legal conclusions, including numerous recitals, more or less general, vague and indefinite, charging various acts of wrongdoing. Among these are accusations of fraud, bad faith, breaches of trust and of fiduciary obligations, and also misappropriation and conversion of corporate assets.

These alleged wrongs are asserted to have commenced with an allegedly fraudulent transaction entered into during the year 1927, in other words, nearly a decade and a half prior to the filing of the present litigation. During that rather lengthy period there were changes in the management of Transamerica through the election of several different boards of directors. Virtually a majority of those defendants who have been sued by their true names and who [302] had served as directors had ceased to have any official connection with that corporation during the respective periods when it is

asserted that all but one of the transactions complained of were consummated.

While it is averred that, with the exception of a few of the partners of Walston and Company, all of the defendants sued by their true names, together with the forty-four other persons listed, had served at one time or another as directors of Transamerica during most of the period within which the alleged wrongs were committed, nevertheless, it is charged that each of the series of transactions complained of stemmed from some corporate act performed by the particular board of directors acting in that capacity at the specific time involved. In other words, but for some corporate step on the part of those certain defendants who functioned as directors at the particular period involved, none of the alleged wrongful transactions could have been effected.

While plaintiff's counsel have argued that all of the acts complained of constituted but a single conspiracy extending over a period of about fourteen years, we see no escape from the conclusion that by her pleading plaintiff has sought to charge—as hereinbefore outlined—the commission of several separate and distinct series of wrongs, each disconnected from all the others. We are not persuaded that the evidence which, for example, might tend to prove the so-called fraudulent salary agreement or the alleged wrongs committed in carrying out the provisions thereof, would have any connection with the evidence pertaining to what has been described as the series of Walston and Company transactions, or would throw any light upon [303] the

Pacific Coast Mortgage Company dealings, or would be relevant to what has been referred to as the series of Smith and Mallory trust syndicate transactions, or would have any connection with the operations whereby it is claimed Transamerica sustained large monetary losses as the result of engaging in stock market manipulations.

Furthermore, we do not perceive upon what legal theory it may be held that under the facts alleged any one of the aforementioned series of transactions constituted a part of or was bound up with any one or more of the remainder. Nor has any case been cited which would support plaintiff's contention to the effect that alleged wrongful acts, done by certain individuals while carrying out their functions as directors of a corporation, may be charged against others who neither were directors at the time such corporate steps were taken nor were otherwise engaged in the specific transaction involved.

Hence we conclude that each claim founded upon a separate transaction, as hereinbefore outlined, should have been stated in a separate count, and that such separation would have facilitated the clear presentation of the matters set forth. (See Rule 10b, FRCP)

In essence the argument advanced by plaintiff's counsel is analogous to that presented on behalf of the plaintiff in the case of *Bowman vs Wolhke*, 166 Cal. 121, 135 Pac. 37. In the latter case, as here, the complaint consisted of but a single count. It was there contended that such a pleading was proper, even though several distinct tortious acts

were complained of, the argument being that these several acts had been committed in pursuance of a single conspiracy. Overruling such contention, the Supreme [304] Court of California there declared in part:

“The theory of counsel for plaintiffs is that by reason of the claim that all the acts were done in pursuance of a conspiracy, we have but a single cause of action stated in the complaint, a cause of action for damages for ‘conspiracy’, and that any variety of wrongful acts whether ordinarily capable of being united in a single action or not may be so united if done in pursuance of a conspiracy. We are satisfied that this theory is irreconcilable with well-settled rules of law, and can not be upheld. * * *

“* * * * For instance, in 1 Cooley on Torts (3d Ed.) p. 210, it is said: ‘The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. The damage is the gist of the action, not the conspiracy.’ In *Green v Davies*, 182 N. Y. 503, 75 N. E. 537, 3 Ann. Cas. 310, it is said: ‘While it is true that in a criminal prosecution for conspiracy the unlawful combination and confederacy are the gist of the offense, not the overt acts done in pursuance thereof, * * * the doctrine does not apply to civil suits for actionable torts.’ (citing cases) * * * To use the words of another New York opinion, such a complaint does not show ‘a single, indivisible wrong, for which an action will lie’ but ‘an aggregation of certain tortious acts for each [305] of which a sepa-

rate action will lie for the recovery of the damages flowing therefrom.' See *Kolel v Eliach*, 29 Misc. Rep. 503, 61 N. Y. Supp. 937. * * *"

That a corporation in the forepart of 1927 entered into an agreement with the president thereof to compensate him for his services on the basis of five percent of its net annual profits, including a guaranteed minimum salary of \$100,000 per year, did not of itself constitute a fraudulent or fictitious or pretended transaction. Likewise, the circumstances that a second corporation about two years later acquired all of the capital stock and all of the assets and assumed all of the liabilities of the first mentioned corporation, including said salary agreement, did not of themselves make such transaction fraudulent or fictitious or pretended. Again, the fact that either or both of these corporations caused credits to be entered upon their respective books or caused disbursements to be made on account of the provisions of said salary agreement—such acts would not, by themselves, become fraudulent or fictitious or pretended. For the pleader to label transactions of the type above mentioned as fraudulent, fictitious, pretended and as being without legal right or authority, would not be stating the ultimate facts from which, if proved, such legal conclusions might properly be drawn, but rather pleading the legal conclusions themselves.

The second amended complaint lists twenty-six corporations as subsidiaries of Transamerica. It is there averred that the latter corporation owned, controlled and operated each of these subsidiaries. As

heretofore pointed out, plaintiff charges that as the result of a series of various alleged wrongful acts both Transamerica and also in some greater or lesser degree, these numerous subsidiaries [306] sustained substantial losses.

In the light of the allegations and admissions in her pleading, and in view of the circumstances and conditions to which attention previously has been directed, we are persuaded that before it can be held that plaintiff has a cause or causes of action against the defendants or any of them, and likewise before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint.

The parties herein sued are entitled to be informed whether plaintiff claims that not only Transamerica but also each and all of these twenty-six subsidiaries, or if only some then which of the latter, acquired all of the capital stock and all of the assets and assumed all of the liabilities of Bancitaly corporation, including the alleged fraudulent salary agreement. Likewise, they ought to be apprised whether she asserts that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, entered upon their books credits and disbursed funds on account of the provisions of said agreement. Furthermore, they should be informed respecting the ultimate facts upon which the pleader bases her charges to the effect that said agreement and the other transactions mentioned were fraudulent, fictitious and pretended,

and without legal right or authority. In addition they are entitled to be advised whether plaintiff claims that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, participated in the remaining series of alleged wrongful acts, including the [307] so-called Walston and Company transactions, the Pacific Mortgage Company dealings, the so-called Smith and Mallory trust syndicate transactions and the stock market manipulations.

Again, and for similar reasons the defendants are entitled to have plaintiff disclose whether she claims that all of them and also all of said forty-four other persons listed as having served at one time or another as directors of Transamerica, or if only some then which of them, held and exercised control of all of the issued and outstanding voting shares of capital stock of Transamerica, and also to set forth the ultimate facts upon which she bases such conclusions. Likewise, these litigants should be informed whether the pleader asserts that all of the defendants and all of the aforementioned forty-four other persons, or if only some then which of them, elected and completely dominated and controlled the several boards of directors of the latter corporation, and also should be given the ultimate facts upon which she bases these conclusions. In addition the litigants ought to be advised whether plaintiff asserts that each and all of the defendants, or if only some then which of them, had knowledge of the facts which she claims constitute the alleged frauds etc., complained of, also whether such knowledge was actual

or constructive, and when it is contended such knowledge was acquired.

Finally and upon similar grounds we believe that the defendants are entitled to have plaintiff state whether she claims that each and all of the defendants, or if only some then which of them, were conspirators, also which if any of the defendants were puppets but not conspirators, also which [308] if any of them were neither conspirators nor puppets but failed to discover the alleged wrongful acts complained of, and which of the defendants though neither conspirators nor puppets discovered such alleged wrongful acts and failed to take action thereon.

Plaintiff has amended her complaint twice. In view of this fact, and of the other circumstances and conditions previously noted, we have concluded that each and all of the respective motions to dismiss should be granted. We have further concluded that the appropriate procedure would be, instead of granting plaintiff unconditionally the right to file another amended complaint, to prescribe the conditions upon which she may apply for leave to file a third amended complaint.

Dated April 16, 1943.

Copies to counsel.

[Endorsed]: Filed Apr 16, 1943. [309]

[Title of District Court and Cause.]

NOTICE OF ORDER GRANTING
MOTIONS TO DISMISS

To Plaintiff above named, and
To Vincent A. Marco, Esq., Percy V. Clibborn,
Esq., Homer N. Boardman, Esq. and Joseph
A. Ruskay, Esq., Her Attorneys:

You, And Each Of You, Will Please Take Notice that on April 16, 1943, the above entitled court duly made and gave its order granted the motions filed on behalf of the respective defendants herein to dismiss the Second Amended Complaint, and further ordering that on or before June 1, 1943, you, the said plaintiff, may file an application for leave to file a Third Amended Complaint, provided that such application have attached thereto your proposed further amended pleading and also be accompanied by a memorandum [310] of supporting points and authorities, and provided further that at least ten days' notice shall be given of the hearing of such application.

Dated: Los Angeles, California, April 19, 1943.

COSGROVE & O'NEIL

T. B. COSGROVE

F. J. O'NEIL

JOHN N. CRAMER

By JOHN N. CRAMER

Attorneys for Amadeo P. Giannini, Individually
and in All of the Capacities in Which He is
Sued

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Apr. 20, 1943. [311]

[Letterhead]

Law Offices

Cosgrove & O'Neil

458 South Spring Street

Los Angeles

October 27, 1942.

Hon. Harry A. Hollzer,
United States District Judge,
Federal Court and Post Office Building,
Los Angeles, California.

In re: Papantonio vs. Giannini;
No. 1490-H Civil.

Dear Sir:

At close of hearing Monday, October 12, 1942, I make a statement respecting the often mentioned letter of December 9, 1931, from the President and Chairman of the Board of Directors of Trans-america to its stockholders concerning the so-called proxy controversy (Tr., p. 96, line 19, to p. 98, line 10). My suggestion was to the effect that the letter upon its face disclosed that the Directors then in office were dealing at arms length with A. P. Giannini (Tr., p. 96, line 22, to p. 97, line 13). Your Honor immediately inquired if the corporate records disclosed that the letter was sent to the stockholders, or directed to be sent to the stockholders (Tr., p. 97, lines 14-17). The following colloquy among counsel occurred:

“Mr. Cosgrove: Yes; and we have an affidavit here supporting our motion that covers that matter.

Mr. Boardman: Not a corporate record.

Mr. Cosgrove: Sir?

Mr. Boardman: It was not a corporate record nor a corporate act.

Mr. Cosgrove: Well, we think it was a corporate act and we think the record discloses it was a corporate act.

Mr. Boardman: Well, I was advised otherwise.

Mr. Ferrari: It was an act of the then board of directors.

Mr. Cosgrove: Yes; it was sent out by them. The letter of the board of directors will disclose that itself." (Tr., p. 97, line 18, to p. 98, line 3.) [313]

Thereupon the court again inquired:

"The Court: Is there anything that discloses from the minutes or any other records of the corporation that such a letter properly was sent to all the stockholders?" (Tr., p. 97, lines 4-6.)

We have secured a photostatic copy of minutes of the meeting of the Board of Directors held December 9, 1931. These minutes are at some length. At page 7, and continuing to page 19, this particular matter is under discussion.

The minutes recite:

"The Chairman (Elisha Walker) submitted to the meeting a copy of a communication dated November 27, 1931 from 'Associated Transamerica Stockholders' addressed to the stockholders, directors, officers and employees, etc. of Transamerica California banks, which he

stated had been mailed to stockholders by 'Associated Transamerica Stockholders' since the last meeting of the Board. He also submitted to the meeting a proposed draft of letter from the Board of Directors to the stockholders and also a proposed letter to the stockholders of the Corporation to be signed by himself and Mr. Bacigalupi. He also submitted to the meeting a form of proxy running to a Proxy Committee consisting of Elisha Walker, James A. Bacigalupi, George Murnane, A. Pedrini and C. N. Hawkins.

"Such letter of 'Associated Transamerica Stockholders' and such proposed letters from the Board of Directors and officers to the stockholders of the corporation, and such form of proxy are as follows:

* * * * *

Then follows copy of each of the documents referred to by Chairman Elisha Walker. Each letter is copied in its entirety in the minutes. Each of the two letters of December 9th is signed by Elisha Walker and James A. Bacigalupi. On one of the two the title "Chairman" appears beneath the signature of Mr. Walker, and "President" below the signature of Mr. Bacigalupi. The letter containing the signatures with designation of office closes with these words: (Caps.) "BY ORDER OF THE BOARD OF DIRECTORS" [314]

Following the letters the minutes disclose this entry:

“Thereupon, after full discussion and consideration, on motion duly made and seconded, the following resolutions were unanimously adopted:

“Resolved that the letter from the Board of Directors to the stockholders of this corporation, dated December 9, 1931, and the form of proxy to be enclosed therewith in the forms which have been submitted to this meeting be, and they hereby are, approved, and the proper officers of this Corporation be, and they hereby are, authorized to mail such letter and proxy to the stockholders of the Corporation in substantially such form;

“Resolved that Messrs. Elisha Walker, James A. Bacigalupi, George Murnane, A. Pedrini and C. N. Hawkins be, and they hereby are, appointed as the Proxy Committee named in the form of proxy approved by the foregoing resolution, to receive and vote such proxies for the purposes therein set forth;

‘Resolved that the Board of Directors hereby approves mailing the proposed letter from Messrs. Elisha Walker and James A. Bacigalupi to stockholders in substantially the form submitted to this meeting in the same envelope with the letter from the Board of Directors to stockholders approved at this meeting.’”

I enclose photostatic copy of the minutes for your

Honor's examination. Another copy is being delivered today to Mr. Boardman, counsel for plaintiff.

Respectfully submitted,

COSGROVE & O'NEIL

By T. B. COSGROVE

TBC:FH

CC—Mr. Louis Ferrari

Mr. Edmund Nelson

Judge Russ Avery

Mr. Gordon Gray

Mr. Claude N. Rosenberg

Mr. G. L. Berrey

Mr. Robert A. Odell

Mr. Homer N. Boardman [315]

MINUTES

A regular meeting of the Board of Directors of Transamerica Corporation, a Delaware Corporation, was held at the office of the Corporation, No. 44 Wall Street, New York, N.Y., on Wednesday, December 9, 1931, at 12:30 o'clock P.M., Eastern Standard Time, pursuant to due notice thereof.

The following directors were present:

Messrs. Frederic W. Allen,

Charles E. Cotting,

Paul D. Cravath,

Frederic C. Dumaine,

Henry O. Havemeyer,

George Murnane,

Roland L. Redmond, and

Elisha Walker,

constituting a quorum of the Board. At about 1 o'clock the meeting was moved to the Rookery Club for luncheon at which point Messrs. Charles W. Nash and Fred W. Sargent joined the meeting.

Mr. D. C. Swatland, counsel, was also present.

Mr. Elisha Walker, Chairman of the Board, presided at the meeting and Mr. Swatland acted as Secretary of the meeting and kept the minutes thereof.

The minutes of the special meeting of the Board of Directors held November 24, 1931, were submitted to the meeting and, on motion duly made and seconded, approved.

The Chairman stated that it was desirable to advance the date of the annual meeting of the stockholders of this Corporation from the last Thursday in March (as now fixed by Section 4 of the by-laws) to the third Monday in February. He stated that for such purpose it was necessary to amend Section 4 of the by-laws. He further stated that in order to effect such amendment, it was necessary in accordance with Section 47 of the by-laws for the Board at this meeting to propose such amendment which must be adopted at the next regular or special meeting of the Board.

Thereupon, on motion duly made and seconded, the following resolution was unanimously adopted:

Resolved that, in accordance with the provisions of Section 47 of the By-laws of the Corporation, this Board hereby proposes that Section 4 of the By-laws of the Corporation be amended to read as follows:

“4. The annual meeting of the stockholders shall be held on the third Monday of February in each year, if not a legal holiday under the laws of the State where such meeting is to be held, and, if a legal holiday under the laws of said State, then on the next succeeding day not a legal holiday under the laws of said State, at 10 o'clock A.M., when they shall elect by a plurality vote, by ballot, a Board of Directors, and transact such other business as may properly be brought before the meeting.”

The Chairman reported to the Board that in accordance with the authority granted by the Board of Directors at their last meeting, the officers had refused to give the information requested by “Associated Transamerica Stockholders” in their demand of November 17, 1931, other than copies of the Certificate of Incorporation and By-laws of the Corporation.

The Chairman reported that in accordance with the resolution adopted by the Board at its last meeting, the officers had signed and delivered to Mr. Lynn P. Talley a contract, a copy of which is as follows: [316]

Agreement, dated November 25, 1931, between Transamerica Corporation, a Delaware corporation (hereinafter called the Corporation), party of the first part, and Lynn P. Talley, of No. 330 Powell Street, San Francisco, (hereinafter called Mr. Talley) party of the second part.

Whereas the Corporation owns or controls over 99% of the capital stock of Bank of America National Trust and Savings Association, a national banking association organized under the national banking laws of the United States and having its head office at No. 1 Powell Street, San Francisco, California (hereinafter called the Bank); and

Whereas the Corporation has asked Mr. Talley to serve, and Mr. Talley has consented to serve, as a director of the Bank and as Chairman of the Board of Directors of the Bank for the period, and at the salary and upon the other terms and conditions hereinafter set forth; and

Whereas Mr. Talley, in pursuance of such agreement, has resigned his position as Governor of the Federal Reserve Bank, Dallas, Texas, and on September 22, 1931 was elected a director of the Bank and Chairman of the Board of Directors of the Bank and has entered upon the performance of his duties as such; and

Whereas the Corporation has heretofore paid to Mr. Talley, the fixed agreed amount of \$25,000 in cash to reimburse Mr. Talley for his expenses in connection with his removal from Texas to California;

Now, Therefore, This Agreement Witnesseth: that in consideration of the acceptance by Mr. Talley of the positions of director and Chairman of the Board of Directors of the Bank as aforesaid, and of the mutual agreements hereinafter set forth, the parties hereto have agreed as follows:

1. The Corporation will use its best efforts to cause the election and/or re-election of Mr. Talley as a director and as Chairman of the Board of Directors of the Bank to hold such offices for a period of at least three years commencing October 1, 1931, and, subject to the election and/or re-election of Mr. Talley to such offices during such period, Mr. Talley will accept such offices during such period and will devote his full time, attention and energy to the due and faithful performance and discharge of the duties of such offices to the best of his ability.

2. The Corporation hereby guarantees the payment to Mr. Talley by the Bank, for three years from October 1, 1931, of a salary at the rate of \$75,000 per year during such period. The Corporation will pay to Mr. Talley at the end of each month during such period the amount, if any, by which the aggregate salary paid to Mr. Talley by the Bank during such month shall be less than one-twelfth of \$75,000. Any salary received by Mr. Talley for his services as an officer of any corporation or institution affiliated with the Bank shall, for the purpose of determining the amount, if any, to be paid by the Corporation under this paragraph 2, be deemed to have been paid to Mr. Talley by the Bank.

3. In the event that Mr. Talley shall cease to hold the office and discharge the duties of Chairman of the Board of Directors of the Bank during such period of three years, because of his death, or voluntary resignation, all obligation and liability of the Corporation hereunder shall thereupon cease and determine, except in respect of any amounts

payable to Mr. Talley hereunder to the date when he shall so cease to hold such office and discharge such duties.

4. If at any time during the three year period above mentioned the Corporation should not own or control a majority interest in the Bank and a majority of the Board of Directors of the Bank should be persons with whom Mr. Talley shall refuse to sit, he may withdraw from the position of Chairman of the Board of Directors of the Bank and such withdrawal shall not be deemed a voluntary resignation as specified in paragraph 3 hereof and shall not affect, change or vitiate this agreement or the payments to be made to Mr. Talley in accordance with the covenants hereof, provided however, that in the [317] event Mr. Talley shall elect so to withdraw, he shall, unless the Board of Directors and the management of the Corporation as at present constituted shall be substantially altered, thereupon give his services to the Corporation, in such capacity as the Board of Directors of the Corporation may designate and without other compensation than the monthly amounts guaranteed to him hereunder, for the remainder of said three-year period. If at any time within said three-year period, the Board of Directors and management of the Corporation as at present constituted should be substantially altered at a time when Transamerica Corporation owns or controls a majority interest in the Bank, Mr. Talley may withdraw from the position of Chairman of the Board of Directors of the Bank and such withdrawal shall not be deemed a voluntary resignation

as specified in paragraph 3 hereof and shall not affect, change or vitiate this agreement or the payments to be made to Mr. Talley in accordance with the covenants hereof.

5. In the event that Mr. Talley shall, for any reason or cause, except as specified in paragraph 3 hereof, cease to hold the offices of Director and Chairman of the Board of Directors of the Bank within said three-year period and if the Corporation shall not thereupon be entitled to receive Mr. Talley's services as provided in paragraph 4 hereof, then the Corporation, provided Mr. Talley shall have up to that time faithfully performed his obligations hereunder, agrees and guarantees to pay to Mr. Talley an amount in cash in one payment to be determined by deducting the total amount of monthly payments theretofore made to him by the Bank and the Corporation from the amount he would have otherwise received during said three-year period at the rate stipulated herein. The payment of such sum by the Corporation shall constitute a full liquidation and discharge of the guaranty and agreements of the Corporation hereunder.

6. This agreement shall inure to the benefit of and be binding upon the Corporation, its successors and assigns, but shall not be assignable in whole or in part by Mr. Talley.

In Witness Whereof, the Corporation pursuant to resolution of its Board of Directors, has caused this agreement to be signed in its name by its proper officers thereunto duly authorized, and Mr. Talley

has hereunto set his hand and seal, this 25th day of November, 1931.

TRANSAMERICA CORPORATION

/s/ By JEAN MONNET

Vice-Chairman of the Board.

Attest:

Assistant Secretary.

/s/ R. P. A. EVERARD (L.S.)

/s/ LYNN P. TALLEY [318]

The Chairman stated that in accordance with the resolution of the Board adopted at its last meeting, the officers had signed the delivered to Dr. A. H. Giannini a contract, a copy of which is as follows:

[319]

Agreement dated November 25, 1931, between Transamerica Corporation, a Delaware corporation (hereinafter called the Corporation), party of the first part, and Dr. Attilio Henry Giannini, of Biltmore Hotel, Los Angeles, California, (hereinafter called Dr. Giannini), party of the second part.

Whereas, the Corporation owns or controls over 99% of the capital stock of Bank of America National Trust and Savings Association, a national banking association organized under the national banking laws of the United States and having its head office at No. 1 Powell Street, San Francisco, California, (hereinafter called the Bank); and

Whereas, the Corporation has asked Dr. Giannini to serve, and Dr. Giannini has consented to serve, as Chairman of the Executive Committee of the Board of Directors of the Bank for the period and at the salary and upon the other terms and conditions hereinafter set forth;

Now, Therefore, This Agreement Witnesseth, that in consideration of the acceptance by Dr. Giannini of the position of Chairman of the Executive Committee of the Board of Directors of the Bank and of the mutual agreement hereinafter set forth, the parties hereto have agreed as follows:

1. The Corporation will use its best efforts to cause the election and/or re-election of Dr. Giannini as a Director and as Chairman of the Executive Committee of the Board of Directors of the Bank to hold such offices for a period of at least three years commencing November 1, 1931, and, subject to the election and/or re-election of Dr. Giannini to such offices during such period, Dr. Giannini will accept such offices during such period and will devote his full time, attention and energy to the due and faithful performance and discharge of the duties of such offices to the best of his ability.

2. The Corporation hereby guarantees the payment to Dr. Giannini by the Bank, for three years from November 1, 1931, of a salary at the rate of \$50,000 per year during such period. The Corporation will pay to Dr. Giannini at the end of each month during such period the amount, if any, by which the aggregate salary paid to Dr. Giannini by the Bank during such month shall be less than

one-twelfth of \$50,000. Any salary received by Dr. Giannini for his services as an officer of any corporation or institution affiliated with the Bank shall, for the purposes of determining the amount, if any, to be paid by the Corporation under this paragraph 2, be deemed to have been paid to Dr. Giannini by the Bank.

3. In the event that Dr. Giannini shall cease to hold the office and discharge the duties of Chairman of the Executive Committee of the Board of Directors of the Bank during such period of three years, because of his death or voluntary resignation, all obligation and liability of the Corporation hereunder shall thereupon cease and determine, except in respect of any amounts payable to Dr. Giannini hereunder to the date when he shall so cease to hold such office and discharge such duties.

4. This Agreement shall inure to the benefit of and be binding upon the Corporation, its successors and assigns, but shall not be assignable in whole or in part by Dr. Giannini.

In Witness Whereof, The Corporation, pursuant to resolution of its Board of Directors, has caused this Agreement to be signed in its name by its proper officers thereunto authorized, and Dr. Gian-

nini has hereunto set his hand and seal this 25th day of November, 1931.

Transamerica Corporation,

/s/ By JEAN MONNET

Vice-Chairman of the Board

Attest:

/s/ J. M. TINKER

Assistant Secretary

/s/ A. H. GIANNINI (L.S.) [320]

On motion duly made and seconded, the following resolution was unanimously adopted:

Resolved that the action of the officers of this Corporation in signing the agreements submitted to this meeting with Mr. Lynn P. Talley and Dr. A. H. Giannini be, and the same hereby is, ratified and confirmed.

The Chairman presented to the meeting a communication to the Board of Directors signed by the Chairman of the Board, the Vice-Chairman and President, consenting to the cancellation of the profit sharing plan authorized by the Board of Directors at a meeting held February 24, 1930. Such communication is as follows:

“Transamerica Corporation

Office of

Chairman of the Board

To: The Board of Directors

Transamerica Corporation

44 Wall Street

New York, N. Y.

Dear Sirs:

In consideration of the execution of similar consents by the other two officers of Transamerica Corporation entitled to participate under the Profit Sharing Plan contained in a resolution adopted by the Board of Directors the Transamerica Corporation at a meeting held February 24, 1930, the undersigned hereby consents to the cancellation and rescission of said resolution and hereby waives all rights thereunder and under said Profit Sharing Plan which has never come into practical operation and under which no payment has ever been made.

Yours truly

(Signed) ELISHA WALKER.”

Similar communications were received from Mr. James A. Bacigalupi and Mr. Jean Monnet, which are as follows:

“Transamerica Corporation
Office of the President

San Francisco, California
December 4, 1931

To: The Board of Directors
Transamerica Corporation
44 Wall Street
New York, N. Y.

Dear Sirs:

In consideration of the execution of similar consents by the other two officers of Transamerica Corporation entitled to participation under the Profit Sharing Plan contained in a resolution adopted by the Board of Directors of Transamerica Corporation at a meeting held February 24, 1930, the undersigned hereby consents to the cancelation and re-cision of said resolution and hereby waives all rights thereunder and under said Profit Sharing Plan which has never come into practical operation and under which no payments have ever been made.

Yours truly,

(Signed) JAMES A. BACIGALUPI.”

[321]

“Transamerica Corporation

San Francisco, California

December 4, 1931

Office of

Vice Chairman of the Board

To: The Board of Directors

Transamerica Corporation

44 Wall Street

New York, N. Y.

Dear Sirs:

In consideration of the execution of similar consents by the other two officers of Transamerica Corporation entitled to participation under the Profit Sharing Plan contained in a resolution adopted by the Board of Directors of Transamerica Corporation at a meeting held February 24, 1930, the undersigned hereby consents to the cancelation and rescission of said resolution and hereby waives all rights thereunder and under said Profit Sharing Plan which has never come into practical operation and under which no payments have ever been made.

Yours truly,

(Signed) JEAN MONNET.”

The Chairman reported to the meeting that Mr. Thomas L. Walker had tendered his resignation as Secretary and Treasurer of the Corporation. He suggested that Mr. L. A. Woolams, Vice-President of the Corporation in charge of its financial matters, be elected as Treasurer and that Mr. J. A. Crooks, Assistant Secretary of the Corporation, be elected as Secretary of the Corporation.

Thereupon, on motion duly made and seconded, the following resolutions were unanimously adopted:

Resolved that the resignation of Mr. Thomas L. Walker as Secretary and Treasurer of the Corporation be, and it hereby is, accepted;

Resolved that Mr. L. A. Woolams be, and he hereby is, elected Treasurer of the Corporation to hold office during the pleasure of the Board of Directors;

Resolved that Mr. J. A. Crooks be, and he hereby is, elected Secretary of the Corporation to hold office during the pleasure of the Board of Directors.

The Chairman submitted to the meeting a statement of the cash and loan position of the Corporation, a copy of which is attached to these minutes. He also reported to the Board that at a meeting of the Board of Directors of Bank of America, N. T. & S. A. (California) held December 8, 1931, the Board of the Bank had determined to omit the declaration of a dividend at this time and to advise its stockholders as to the earnings of the Bank, with a statement that such earnings would be applied to the writing down of value of the Bank premises and other reserves.

The Chairman submitted to the meeting a copy of a communication dated November 27, 1931 from "Associated Transamerica Stockholders" addressed to the stockholders, directors, officers and employees, etc. of Transamerica California banks, which he stated had been mailed to stockholders by "Asso-

ciated Transamerica Stockholders'' since the last meeting of the Board. He also submitted to the meeting a proposed draft of letter from the Board of Directors to the stockholders and also a proposed letter to the stockholders of the Corporation to be signed by himself and Mr. Bacigalupi. He also submitted to the meeting a form of proxy running to a Proxy Committee consisting of Elisha Walker, James A. Bacigalupi, George Murnane, A. Pedrini and C. N. Hawkins. [322]

Such letter of "Associated Transamerica Stockholders" and such proposed letters from the Board of Directors and officers to the stockholders of the Corporation, and such form of proxy are as follows:

[323]

Associated Transamerica Stockholders

456-8 Phelan Building

San Francisco, California

November 27, 1931.

To My Fellow Stockholders:

The Directors, Advisory Board Members, Officers and Other Employees of Transamerica California Banks:

We have been requested by many of those to whom Mr. James A. Bacigalupi, President of Transamerica Corporation, sent a letter under date of November 19, 1931, to express our views concerning the matters referred to therein. If Mr. Bacigalupi's letter were confined to the proper business of the Corporation, it would not be noticed by us. The ill-will and misunderstanding, however, which that

letter was calculated to create, compel us not to ignore it, but to express our views concerning it in writing.

Certain matters mentioned by Mr. Bacigalupi in his letter present rather serious problems to the officers and employees of Transamerica Corporation and its subsidiaries, who have been circularized by him. For that reason we have requested Mr. A. P. Giannini to advise us concerning those matters, and he has done so.

Associated Transamerica Stockholders is composed of stockholders of Transamerica who are friends of Transamerica, and who have given unmistakable evidence that they are interested in doing everything they can to uphold and conserve and extend the business of the institutions referred to by Mr. Bacigalupi. There is no management of a corporation, however powerful or prosperous it may believe itself to be, which can afford to proscribe stockholders and alienate their goodwill. Goodwill always has played an indispensable part in getting and holding profitable business for banks, and always will. Men who have spent years of devoted service in building up these banks cannot conscientiously remain quiet and permit assets to be dissipated and goodwill to be driven away by those now vested with authority. Goodwill built up through twenty-five years of unfailing service, the splendid morale and the fine spirit which brought to the bank its leadership are far more valuable, and the public opinion behind it is far more powerful, than the present management seems to realize.

We deplore the injection of the banks into this controversy between Transamerica stockholders as being not in their best interest and we regret that the management of the banks have unwisely threatened the personnel with reprisals should they not 'be on one side of this question only.' For the good of the service we want to take advantage of this opportunity to assure you all that we shall indulge in no reprisals against those who are conscientiously and sincerely performing their duty, however the present differences may be determined.

The constructive and co-operative policy which Associated Transamerica Stockholders proposes does not contemplate two hostile groups, one composed of the officers and employees of Transamerica Corporation and its subsidiaries, and the other of the members of our association. Our policy is for all to work with a common spirit and purpose for the advancement of Transamerica for the mutual benefit of all. For this reason Mr. Bacigalupi's letter is out of perspective altogether. We stand squarely upon our letter of November 7, 1931, and in spite of impediments which have been deliberately placed in our way by the management of Transamerica, we are getting more and more facts and instances which show how detrimental Walker's plan is to the stockholders.

Rhetorical references by Mr. Bacigalupi to "old allegiance", "Duty", "Solace", "Old Chief", "Friend", "distressing experience", "Renewed confidence and prestige" are much too shallow to satisfy stockholders who believe that the present unfortu-

nate position of Transamerica stock is due to manipulation, and that the stock market value of the stock has designedly been depressed out of all relation to its real value.

Mr. Bacigalupi sees nothing to condemn, but much to admire in Elisha Walker's executive control. His complacent assent to the Walker program, and his eloquent defense of Walker's actions, which have worked such hardship on the stockholders, emphasize the need, expressed in our letter of November 7, 1931, for "a more adequate representation on the directorate to Western stockholders". [324]

One fact of the past administration stands out unchallengeable in bold contrast to the present management:

The Walker regime has not been successful for the stockholders.

By two decisive criteria we may best decide this question. Dividends which were regularly paid throughout twenty-five years by the former administration were quickly reduced by Walker and finally discontinued. The market value of the stock has steadily declined under Walker's treatment.

Since every stockholder is materially affected by the situation, it is good judgment and sound business procedure for the stockholders to do something constructive to remedy matters. In our letter of November 7, we made this statement with which we feel all fairminded men will agree:

"To do effective work we must have a sufficient number of proxies upon which we can absolutely

count—the policy of the law is to have freedom of voting, and we deplore any arbitrary actions which would limit this basic right to cast your vote in the manner you consider most beneficial to your investment”.

By what right, then does Mr. Bacigalupi take upon himself the authority to issue a ukase in a matter of such vital importance to stockholders. We consider such unwarranted action to be an invasion of the rights of the stockholders. Mr. Bacigalupi demands that no proxies be given “except as requested by the Board of Directors”, which of course means to the Walker regime. We repeat that “it is unfortunate that the men who are your servants should thus assume to be your masters”. If Mr. Bacigalupi’s servile plan were followed, the Board of Directors invariably would perpetuate itself, and stockholders would have no voice in the management of their properties. The unfairness and the unreasonableness of such a policy cannot be tolerated. The right of a majority of the stockholders to discharge Elisha Walker or any other executive and to select others most likely to advance their interests cannot be questioned.

To the remaining matters mentioned by Mr. Bacigalupi in his letter, we are making specific response, based upon information furnished us by Mr. Giannini:

1. Mr. Bacigalupi states that every single one of “our old director associates” favored the adoption of Transamerica’s proposed new plan and voted therefor. We do not know to which former director

associates Mr. Bacigalupi refers. At the June 17, 1931, meeting at which the Walker plan was approved in principle, there were present only twelve directors, all of whom, with possibly one exception, were salaried officers of Transamerica Corporation or affiliated companies. Eighteen directors were absent. From reports of that meeting, Mr. Giannini is convinced that his disapproval of the plan was not fully and fairly presented by Mr. Bacigalupi. At that meeting the Walker plan was approved, form of proxy adopted and notice of special meeting of stockholders, to be held July 21, 1931, authorized to be sent. Following the meeting in a letter dated June 17, 1931, jointly signed by Elisha Walker and Jas. A. Bacigalupi, and in the proxy and notice that accompanied it there is a singular silence about anything relating to the new plan. Why were stockholders kept in the dark. Who more than they were entitled to be informed about and have the opportunity to approve or disapprove a plan which affected their interests so vitally, and deviated so radically from the old established policies.

2. Mr. Bacigalupi states that Mr. Giannini headed a standing committee holding proxies, which he could have used to oust Mr. Walker, had he desired so to do, and that he permitted the situation to remain unchanged. Mr. Bacigalupi fails to mention the fact, however, that out of the committee of five named in the seven-year proxies, which committee he stated Mr. Giannini "headed", three members had been requested to give and had given to

Mr. Walker or his agents an irrevocable substitution of attorneys. Under these circumstances, it is obvious that proxies could have been utilized by Mr. Giannini in opposition to Mr. Walker and his agents.

3. It is true that Mr. Giannini asked Mr. Bacigalupi to take the presidency when requested telegraphically, to do so by a mutual friend and director. At that time, however, Mr. Giannini had not the remotest idea that the new president would become the advocate of policies outlined in the present Walker plan, which deviate so basically from the gospel which Mr. Bacigalupi himself had at all times previously preached with such convincing effect. No objection was made by Mr. Giannini as long as the policies previously enunciated were [325] adhered to, but when he became convinced that the Walker management, in pursuance of its subsequently declared policy, threatened to and actually did begin to dispose of Transamerica assets, at unreasonably low prices, he concluded that he would no longer be justified in remaining silent. The mere circumstance that Mr. Bacigalupi individually believes that Mr. Walker is doing "his best" in the interests of the stockholders presents no reason why the 248,000 stockholders of Transamerica should not organize for the purpose of ascertaining the facts, and after such facts have been ascertained, determining for themselves, regardless of Mr. Bacigalupi's views, whether the policy being pursued is for the best interests of Transamerica and its stockholders.

4. Mr. Bacigalupi attempts to justify the failure to pay dividends upon the ground that the income of Transamerica is being used to pay interest upon an indebtedness which he asserts was created under the former administration and because of losses resulting from the sale of securities in order to reduce such indebtedness. Although Mr. Bacigalupi, at the behest of Mr. Walker, has arbitrarily denied to the stockholders the right of access to the books and records of Transamerica and its subsidiaries, which the stockholders are legally entitled to inspect, and has thereby attempted to prevent the stockholders from knowing what is being done with their property, there are, however, certain indisputable facts which we do know. It appears from Mr. Walker's letter of September 22, 1931, that loans of approximately \$46,000,000 were offset by cash and government bonds to the extent of \$21,000,000. Why the management continued to pay interest on \$46,000,000 instead of disposing of the government bonds, upon which a low rate of interest was being paid, and applying the proceeds of these bonds and the available cash on account of this indebtedness is difficult to understand. During the Walker administration large sums were expended in cash purchases of securities, and new loans and other new commitments substantial in amount were incurred which did not exist under the former administration. At the end of 1929, when the Walker management assumed control, the certified statement filed, at the time of listing, with the New York Stock Exchange showed that Inter-Continental Corporation had ac-

counts payable on December 31, 1929,—the time of Mr. Giannini's actual retirement—of \$12,673,185.20, with securities pledged against same of an aggregate book value of \$21,285,875.73, out of a total investment in stocks and bonds—other than affiliated of \$20,882,426.93—of \$61,805,965.91. On June 30—six months after Mr. Giannini's retirement—only \$8,000,000 was owed. Investment in stocks and bonds alone at that time at market value was \$50,543,790.71. On December 31, 1929, Bankitaly Company of America owed notes payable—secured—of \$22,500,000. Book value of investments in stocks and bonds—other than affiliated of \$265,043,088.11—was \$40,241,238.30. Market value of said securities was approximately \$2,500,000 in excess of carrying value. The above facts indicate that Mr. Bacigalupi's statements regarding loans and dividends are not well founded. Also, it should be remembered that six dividends were paid by the present management. If conditions were as represented by Mr. Bacigalupi, why were these six dividends paid, and why was the following statement made on March 9, 1931, by Walker:

“Your Directors feel that a part of the large surplus resulting from more prosperous periods, but not heretofore paid to stockholders, may be used to a reasonable extent, if necessary, for the continuance of the present regular cash dividends”.

5. With reference to the Bank of America in California, Mr. Bacigalupi states:

“Our policy contemplates the return of this bank to California direct ownership and control”.

Obviously, all stockholders of Transamerica have equal rights, and California stockholders cannot be preferred to stockholders outside of California. At the present time approximately 75% interest in these banks is owned by Californians through their ownership of Transamerica shares. We are opposed to the distribution of any assets through rights. Thousands of stockholders lack the money to exercise such rights, and stockholders should not be asked to buy again assets they already own. We insist that any distribution of assets should be free to stockholders on a pro rata basis.

Mr. Bacigalupi states:

“No disposal of the majority interest . . . will be made”. [326]

Nothing is said, however, regarding the disposal of a minority interest, which itself might effectively control those banks. Even now the stockholders have no assurance respecting the disposition of these banks. Mr. Bacigalupi, in referring to the bank holdings of Transamerica, states:

“These may be disposed of shortly, or it may require a longer time—the banks constitute a very substantial part of all the assets of Transamerica.”

In fact, Mr. Bacigalupi states that “the bank in California is the largest and most valuable asset of Transamerica Corporation.”

In this connection our counsel have advised us that it is the policy of the law, and it is certainly in accord with fair dealing, that the directors of a corporation should not dispose of substantially all of the assets of a corporation without the acquiescence of the stockholders.

There is no advantage apparent to us in the sale to stockholders of the California banks on an asset value basis. They now own their pro rata interest in these banks, and should receive that interest, if distribution becomes necessary, without additional outlay by them. It is purely speculative to allege the possible passage of adverse legislation as a reason why such action should not be taken. Furthermore, it is always possible to dispose of ownership which might conflict with new legislation by a free distribution to stockholders.

The sale by Bancitaly Corporation, of Bank of America, N.A. New York, to its stockholders and stockholders of the Bank of Italy is not comparable with the existing situation. This property was sold at that time because of an arbitrary ruling of a governmental agency, made without legal justification. All of these facts were and are well known to Mr. Bacigalupi and his then associates, who fully concurred and acquiesced in the course then taken. Mr. Giannini has in mind to disclose these facts together with certain other agreements at the proper time and place.

6. In his letter, Mr. Bacigalupi states:

“This stock—Bank of America—is owned by Transamerica Corporation, just as it owns any

other assets, and the stockholders of Transamerica Corporation have only an indirect interest in it or its equivalent."

This statement is typical of the present attitude of the management toward stockholders. Such attitude was emphasized in a statement made by Mr. Bacigalupi in the presence of our counsel at the time when we presented our demand for an inspection of the records of the Corporation, when he said, in substance, that stockholders have no right to inspect the records or to demand information concerning the disposal of the assets of a corporation.

7. The statement contained in Mr. Bacigalupi's letter to the effect that "our new associates have brought renewed confidence and prestige" is difficult to understand, in the light of developments, market-wise and otherwise, occurring since the Walker management took control. Stockholders should have the right, which is accorded them by law, but which is denied by Mr. Bacigalupi, of determining for themselves the policies which should be pursued in the management and disposition of their properties, and of selecting as their representatives those who are sympathetic with such policies.

Before concluding this letter, we believe it proper to advise you that in response to our communication of Nov. 7, Transamerica stockholders have sent, and are now sending to us, thousands of proxies. The situation is known to the present management and fully accounts not only for their endeavor to secure the revocation of these proxies, and thus

enable themselves to be perpetuated in control, but likewise for the writing and transmission to you of the letter of Mr. Bacigalupi. His letter is an attempt to have you persuade the stockholders by whom proxies have already been executed to repudiate their solemn agreement entered into with the proxy committee of Associated Transamerica Stockholders.

Stockholders may fairly demand that the undivided time of employees shall be given to building up the business of the corporation and that executives shall not divert the energies of employees to placing obstacles in the path of stockholders. Above all, they shall refrain from activities which can serve no other purpose than to alienate the goodwill of stockholders and inevitably lead to unhappy consequences.

Sincerely yours,

CHARLES W. FAY,
Chairman. [327]

Confidential.

Transamerica Corporation

December 9, 1931.

To the Stockholders of
Transamerica Corporation:

In connection with the enclosed letter to stockholders from the Board of Directors with reference to "Associated Transamerica Stockholders", and in view of the attack upon the policies of the present management by this group, your officers take this opportunity to communicate to all stockholders in-

formation which we have already given to some in answer to inquiries, and which we believe, will make it clear that stockholders, for their own good, should support the present Board of Directors which is responsible for the management of the Corporation.

I.

In its letter, your Board of Directors states again the reasons for adopting the policy of ultimately disposing of the shares of stock in the banks controlled by Transamerica, namely that it is essential to the complete success of a bank that it should be operated and publicly regarded as an independent institution without responsibility for, or connection with, any other business. In order that there may be no misunderstanding, we wish to emphasize, as previously announced, that no plan for disposing of Transamerica's holdings of stock of Bank of America N. T. & S. A. (California) will be adopted without a vote of the stockholders of Transamerica at a meeting called for that purpose, nor will Transamerica stockholders be asked to vote on any plan until they have had an opportunity fully to inform themselves regarding it at the time of its submission. Pending the approval of any such plan, the Corporation will not dispose of any of its holdings in the stock of that Bank.

II.

In the recent communication from "Associated Transamerica Stockholders", reference is made to salaries and compensation of officers. It is proper

to state the following for the information of stockholders.

(1) The present officers of the Corporation and its subsidiaries are receiving and have received during the period of the present administration only nominal salaries, commensurate with the duties and responsibilities of their respective offices, and are receiving and have received no bonus, profit sharing or other special or unusual payments or compensation. The salaries of the Chairman of the Board and the Vice-Chairman were arranged by Mr. A. P. Giannini before he retired in February 1930, and are, respectively, \$100,000 and \$50,000 a year. Mr. Bacigalupi, who became President after the retirement of Mr. L. M. Giannini in March 1931, is receiving a salary of \$60,000 a year.

(2) The only record of extraordinary compensation relates to Mr. A. P. Giannini. In 1927, the Board of Directors of Bancitaly Corporation, predecessor of Transamerica, adopted a resolution approving the payment to Mr. Giannini, as President of Bancitaly Corporation, of 5% of the profits each year. This arrangement was not continued after the formation of Transamerica Corporation, but presumably based upon his claim to such a percentage of the profits of Bancitaly Corporation, there was placed to Mr. Giannini's credit from the cash funds of Bancitaly Corporation or of Transamerica or its subsidiaries, during the three year period 1927-1930 no less than \$3,700,000. This sum does not include the \$1,500,000 given at Mr. Giannini's request by Bancitaly Corporation to the Uni-

versity of California to establish the Giannini Foundation and for the building of Giannini Hall. Of said \$3,700,000, \$2,400,000 was placed to his credit between December 20, 1929 and January 21, 1930, after the stock market crash and immediately before his retirement from active service with the Corporation. All of said \$3,700,000 has been withdrawn by, or paid upon the order of, Mr. A. P. Giannini, except an unpaid balance of \$792,000 which in September of this year Mr. Giannini demanded and which the present Board of Directors, on the advice of counsel, has refused to pay. The Board has sought the advice of eminent counsel regarding the legality of the payments made to Mr. Giannini.

III.

The recent communication of "Associated Trans-america Stockholders" refers to the right of stockholders to full information regarding the affairs of their Corporation. It will be remembered that during Mr. A. P. Giannini's administra- [328] tion, when he held seven-year proxies from holders of a majority of the stock, stockholders were furnished with only the most meager reports which did not explain the Corporation's financial position. The management which succeeded Mr. Giannini determined to change these methods. One of their first acts was to employ Messrs. Ernst & Ernst, certified public accountants, to make a thorough study of the Corporation's affairs. After receiving the report of these accountants, the Board of Directors issued to stockholders their full statement

dated July 12, 1930, which was the first official statement adequate to enable stockholders to form their own opinion as to the value of their property. At the same period the Board of Directors caused the shares of the Corporation to be listed on the New York Exchange, with whom they entered into an agreement to publish audited annual statements to stockholders.

IV.

The spokesman for the "Associated Transamerica Stockholders" calls attention to the decline in the market value of Transamerica stock which had progressed far during Mr. Giannini's regime and has continued during the administration of the present management. Some of the causes of this decline are as follows:

1. The decline followed the nation-wide decline of security prices and especially of the shares of investment companies.

2. The absence of accurate information regarding the Corporation during the former administration resulted in surrounding the stock with mystery which doubtless contributed to its rise during the years of generally rising prices but operated in contrary fashion to bring down the price of the stock when the market turned.

3. The fact that when the entire market began to decline at the end of October, 1929, the Corporation under Mr. Giannini's direction maintained Transamerica at a high and artificial level from which it fell rapidly when the support was removed. During the four weeks ending October 28, 1929,

over \$68,000,000 was expended by the Corporation in the purchase, on balance of over 1,090,000 shares of Transamerica stock at an average cost of \$62.50 per share. This policy of attempting to hold the price of Transamerica stock, when the prices of all other securities were dropping rapidly left the Corporation at the end of 1929 with a serious reduction in quick assets and with large indebtedness. Another result of that artificial and costly attempt of Transamerica to peg the market value of its own stock was to give speculators and market operators an opportunity of selling their stock to the Corporation at high prices, while loyal stockholders, uninformed of the situation, suffered great losses. Those who sold during this period profited, while those who remained loyal shared in the loss to the Corporation resulting from the purchases of Transamerica stock. Following the stock market crash in the fall of 1929, the Corporation faced a difficult future. It was at this point that Mr. Giannini retired.

V.

The charge that the fall of the value of Transamerica stock is due to manipulation and sales by persons associated with the present management is not true. Your Chairman wishes to point out to stockholders that since he became your chief executive officer he has been the largest holder of Transamerica stock and that he has never sold a single share of his holdings or in any way speculated in the stock, directly or indirectly.

VI.

The "Associated Transamerica Stockholders" refer to the dividend policy during Mr. Giannini's regime and the reduction and later the suspension of dividends, which occurred prior to the election of the present Board. The dividend policy during Mr. Giannini's regime was made possible by the appreciation in securities generally during an exceptional period of rising prices. Such dividend policy was bound to end upon the advent of the period of rapidly declining prices which began in the fall of 1929 and has continued until the present time. Mr. Giannini's retirement coincided with the beginning of the period of declining prices, since which time the principal source, and indeed almost the only source, of income for individuals has been the current income [329] on the Corporation's investments. Your Board's decision to interrupt the payment of dividends was a wise and necessary measure to conserve the Corporation's cash resources in order to provide for the reduction of the Corporation's large floating debt, chiefly caused, as pointed out above, by the large purchases of Transamerica shares at high prices during Mr. Giannini's regime.

VII.

The suggestion that your Board of Directors is disposing of the Corporation's assets unwisely is incorrect. The merger of The Bank of America N. A. (New York) with The National City Bank of New York, which has recently been consummated by virtue of an overwhelming vote of the share-

holders of both banks, is most beneficial to Transamerica stockholders. As a result of this merger, Transamerica now owns, in place of 63% of the stock of The Bank of America N. A. (New York), a very substantial interest in The National City Bank, one of the largest banks of the world. This merger should materially increase the value of this investment. Based on relative dividends currently paid at the time of the merger it will result in a material increase in the income from this investment.

VIII.

It is true, as stated by the "Associated Transamerica Stockholders", that the asset values given in the circular of the present Board under date of September 22 differs from the book values published two years earlier. The change is due to the fact that the Corporation's investments in controlled banks and other subsidiaries had been previously carried at the cost thereof at a time when prices were materially higher than today, while the revised statement on which the letter of September 22 was based, gives the net asset value of the subsidiaries regardless of their cost and after eliminating all value for good will and providing substantial reserves. The latest statement was made in this form in order that stockholders might have reliable and unvarnished information regarding the net asset value of their investment.

IX.

The Board of Directors aims to improve the

condition of the properties in their charge and to place the enterprise on a sound and conservative basis. Definite progress has already been made in that direction which should make possible the resumption of dividends as soon as general conditions will permit.

Stockholders are earnestly urged, in their own interest, to support the present Board of Directors of the Corporation, and to sign and return the enclosed proxy, without delay, in the enclosed envelope.

If, after reading this letter, you have any doubt as to what action you should take, you are urged, in your own interest, to consult any bank or banker of standing in your community.

Yours sincerely,

ELISHA WALKER JAMES A. BACIGALUPI

[330]

Confidential.

Transamerica Corporation.

December 9, 1931.

To the Stockholders of
Transamerica Corporation:

A committee calling themselves "Associated Transamerica Stockholders", sponsored by Mr. A. P. Giannini, have, through circular letters which your Board regards as inaccurate and misleading, criticized the management of your Corporation and its policies and have asked for proxies.

The recently elected members of your Board accepted their positions with the definite purpose of

supporting the management in carrying out the policies announced in the letter to stockholders dated September 22, 1931, and all members of the Board have unqualifiedly endorsed these policies.

Your attention is called to the following:

(1) In the September letter, the present Board clearly stated its position and plans, which include the complete separation of its controlled banks from the other activities of Transamerica. Your Board believes that it is unsound to link, through a holding company, the ownership and control of a bank with other unrelated activities, and that it is essential to the complete success of any bank that it should be operated and publicly regarded as an independent institution without responsibility for, or connection with, any other business. It was for this reason that your Board announced in September the policy of confining the Corporation's investments in the banking field to minority interests not involving controlling influence. The eventual separation of Bank of America N. T. & S. A. (California) from the control by Transamerica, in accordance with this policy, will give the Bank complete independence in its lending and investment policies, which is the only sound foundation for a bank.

(2) Your Board has determined that the Corporation will not dispose of any of its holdings in the stock of Bank of America N. T. & S. A. (California), except in accordance with a plan which shall have first been approved by Trans-

america stockholders at a meeting called for the purpose.

(3) The present management has furnished to stockholders frank and adequate reports and audited statements of the conditions and affairs of the Corporation which had never previously been made available. In order that stockholders might be informed as to the asset value of their investment, your Board published figures in September showing the net assets values of the Corporation's holdings after eliminating all value for good will and providing for necessary reserves.

(4) The present management has materially reduced the heavy short-time debt of the Corporation inherited from the former administration.

(5) The interruption of the payment of dividends was a necessary and conservative measure to conserve the Corporation's cash resources in order further to reduce such debt.

(6) Your Board has arranged for the merger of The Bank of America N. A. (New York) with The National City Bank of New York, as a result of which your Corporation's holdings in the former Bank have been exchanged for a substantial interest in The National City Bank, one of the leading banking institutions in the country. Your Board believes this change will materially increase the value of this investment.

(7) Your Board has returned to stockholders the former seven-year proxies running to Mr. Giannini and his associates, in order to restore to stockholders the freedom of voting to which they are entitled.

(8) Your Directors feel that the management has made definite progress toward putting the affairs of your Corporation on a sound and conservative basis.

(9) As any continued controversy between shareholders is detrimental to a corporation, your Board has decided to amend the by-laws to advance the next annual meeting for the election of directors to February 15, 1932 (instead of [331] March 31, 1932), at which time stockholders may determine whether they wish to support the present Board or one chosen by Mr. Giannini and his associates. This change of date will not invalidate proxies already properly signed.

(10) Stockholders are requested to indicate their support of the present Board of Directors by signing and returning the enclosed proxy in the enclosed envelope without delay. This proxy, when signed, automatically revokes any proxy previously given, even if such proxy be by its terms irrevocable. No proxy is irrevocable. The last proxy supersedes all previous ones.

(11) If, after reading this letter, you have any doubt as to what action you should take, you are urged, in your own interest, to consult any bank or banker of standing in your community.

By Order of the Board of Directors

JAMES A. BACIGALUPI

President.

ELISHA WALKER

Chairman [332]

3642—December 9, 1931—D

Transamerica Corporation

Proxy For Annual Meeting of Stockholders

Know All Men By These Presents, that the undersigned stockholder of Transamerica Corporation, a Delaware corporation (hereinafter called a Corporation), does hereby make, constitute and appoint Elisha Walker, James A. Bacigalupi, George Murnane, A. Pedrini and C. N. Hawkins the true and lawful attorneys and proxies, and each of them the true and lawful attorney and proxy, of the undersigned, with full power of substitution, for and in the name, place and stead of the undersigned, to attend the next annual meeting of stockholders of the Corporation to be held at the office of the Corporation, No. 100 West Tenth Street, Wilmington, Delaware, on February 15, 1932, at ten o'clock in the forenoon, Eastern Standard Time, or at such other time and place as may be stated in the notice of such meeting, and any meeting or meetings held in lieu of or in substitution for said annual meeting, or any adjournment or adjournments of any of said meetings, and thereat to vote the number of votes or shares of stock the undersigned would be entitled to vote if then personally present, for the election of directors of the Corporation for the ensuing year and on any and all matters which may be referred to in any notice or notices of any such meeting or which may properly come before any such meeting, or any adjournment or adjournments thereof, as fully and with the same effect as the undersigned might or

could do if personally present at any such meeting or at such adjournment or adjournments thereof, hereby ratifying and confirming all that said attorneys and proxies, or any of them, or their or his substitutes or substitute, may lawfully do or cause to be done by virtue hereof, and hereby revoking all proxies to vote said shares heretofore given for any purpose whatsoever to any person or persons whomsoever. If more than one of the above named attorneys and proxies shall be present and voting in person or by substitute at any such meeting, or at any adjournment or adjournments thereof, the majority of the attorneys and proxies so present and voting, either in person or by substitute, shall exercise all the powers hereby given. This Proxy Confers No Power To Vote Or Consent With Respect To Any Plan For The Disposition By The Corporation Of The Shares Of Capital Stock Owned Or Controlled By It In Bank Of America N. T. & S. A. (California).

In Witness Whereof, the undersigned has executed this proxy under seal this.....day of
..... A. D. 193....

..... (L.S.)

(Signature of Stockholder)

Note: Stockholders should sign the proxy and return the same in the enclosed envelope. The signature should correspond with the name of the stockholder as it appears below. A proxy to be executed by a corporation should be signed in its name by its President or other officer duly authorized to sign the name and its corporate seal

should be affixed and attested by its Secretary or other proper officer. [333]

Thereupon, after full discussion and consideration, on motion duly made and seconded, the following resolutions were unanimously adopted:

Resolved that the letter from the Board of Directors to the stockholders of this Corporation, dated December 9, 1931, and the form of proxy to be enclosed therewith in the forms which have been submitted to this meeting be, and they hereby are, approved, and the proper officers of this Corporation be, and they hereby are, authorized to mail such letter and proxy to the stockholders of the Corporation in substantially such form;

Resolved that Messrs. Elisha Walker, James A. Bacigalupi, George Murnane, A. Pedrini and C. N. Hawkins be, and they hereby are, appointed as the Proxy Committee named in the form of proxy approved by the foregoing resolution, to receive and vote such proxies for the purposes therein set forth;

Resolved that the Board of Directors hereby approves mailing the proposed letter from Messrs. Elisha Walker and James A. Bacigalupi to stockholders in substantially the form submitted to this meeting in the same envelope with the letter from the Board of Directors to stockholders approved at this meeting.

The Chairman read to the meeting a draft of proposed letter to be sent to stockholders by the former executive and director associates of A. P. Giannini which draft letter is as follows: [334]

Letterhead of
Transamerica Corporation.

San Francisco, California

December 9, 1931.

To The Stockholders Of Transamerica Corporation:

We, who were the executive and director associates of Mr. A. P. Giannini in the Bank of Italy, N. T. & S. A., Bancitaly Corporation and/or Transamerica Corporation, feel compelled to publicly inform stockholders of Transamerica of our position at the present time.

We feel that we have full knowledge of the facts and we are convinced that Mr. A. P. Giannini's attacks on the present management are misleading and detrimental to your Corporation.

We desire to call your attention to the following:

1. The present management was invited to assume the direction of Transamerica Corporation by Mr. A. P. Giannini.

2. The policies of the present management have been and are supported by all former Transamerica director associates of Mr. Giannini and responsible banking and business leaders in California and the country.

3. The new directors of your Corporation are national business leaders of the highest reputation and integrity.

4. The sole opposition to the policies of your present Board is by Mr. A. P. Giannini, his son, Mr. L. M. Giannini and the "Associated Trans-

america Stockholders'', of which Mr. A. P. Giannini is the Adviser.

We unanimously endorse the policies announced by your Board as the only policies, in our opinion, suitable for and adapted to the successful management of Transamerica Corporation, the Bank of America, N. T. & S. A. (California) and the institutions controlled by and affiliated with Transamerica.

Stockholders are urged to support the policies of the present Board of Directors.

Very truly yours, [335]

It was the sense of the meeting that it was desirable that such a letter should be sent to stockholders. The meeting discussed the necessity of following up the letters to stockholders by personal communication with stockholders with a view to have as many shares as possible represented at the annual meeting in person or by proxy, it being the sense of the meeting that more results could be expected from such solicitation than from the letters themselves.

There being no further business to come before the meeting, it was, on motion duly made and seconded, adjourned.

DONALD C. SWATLAND

Acting Secretary

ELISHA WALKER

Chairman [336]

Transamerica Corporation

Office of
Chairman of the Board

To: The Board of Directors,
Transamerica Corporation,
44 Wall Street,
New York, N. Y.

Dear Sirs:

In consideration of the execution of similar consents by the other two officers of Transamerica Corporation entitled to participate under the Profit Sharing Plan contained in a resolution adopted by the Board of Directors of Transamerica Corporation at a meeting held February 24, 1930, the undersigned hereby consents to the cancellation and rescission of said resolution and hereby waives all rights thereunder and under said Profit Sharing Plan which has never come into practical operation and under which no payments have ever been made.

Yours truly,

ELISHA WALKER [337]

Transamerica Corporation

Office of the President

San Francisco, California,

December 4, 1931.

To: The Board of Directors,
Transamerica Corporation,
44 Wall Street,
New York, N. Y.

Dear Sirs:

In consideration of the execution of similar consents by the other two officers of Transamerica Corporation entitled to participation under the Profit Sharing Plan contained in a resolution adopted by the Board of Directors of Transamerica Corporation at a meeting held February 24, 1930, the undersigned hereby consents to the cancelation and recision of said resolution and hereby waives all rights thereunder and under said Profit Sharing Plan which has never come into practical operation and under which no payments have ever been made.

Yours truly,

JAMES A. BACIGALUPI [338]

Transamerica Corporation

Office of

Vice Chairman of the Board

San Francisco, California,

December 4, 1931.

To: The Board of Directors,
Transamerica Corporation,
44 Wall Street,
New York, N. Y.

Dear Sirs:

In consideration of the execution of similar consents by the other two officers of Transamerica Corporation entitled to participation under the Profit Sharing Plan contained in a resolution adopted by the Board of Directors of Transamerica Corporation at a meeting held February 24, 1930, the undersigned hereby consents to the cancelation and re-cision of said resolution and hereby waives all rights thereunder and under said Profit Sharing Plan which has never come into practical operation and under which no payments have ever been made.

Yours truly,

(ILLEGIBLE) [339]

Transamerica Corporation

Oath of Secretary

State of New York

City and County of New York—ss.

I, J. A. Crooks, being duly sworn, do hereby promise and swear that I will faithfully discharge

the duties of Secretary of Transamerica Corporation, a Delaware corporation, to the best of my ability and understanding.

J. A. CROOKS

Subscribed and sworn to before me this 16th day of December, 1931.

JOHN KRAUS

Notary Public, Queens County. Queens Co. Clks.

No. 3830 Reg. No. 5837 N. Y. Co. Clks. No.

1118 Reg. No. 2K24A Kings Co. Clks. No. 258

Reg. No. 2416. Commission Expires March 30,

1932. [340]

CONDENSED STATEMENT OF CASH POSITION

(Including Estimated Forward Position to February 29th, 1932)

At Close of Business December 8, 1931

Cash in Banks

San Francisco,

| | |
|---|-------------|
| Bank of America, NT & SA (Corporation of America) | \$ 805,000. |
|---|-------------|

| | |
|--|----------|
| Bank of America, NT & SA (Inter-Continental Corp.) | 900,000. |
|--|----------|

| | |
|---|----------|
| Bank of America, NT & SA (Transamerica Savings) | 400,000. |
|---|----------|

Chicago,

| | |
|--|----------|
| Continental Illinois Bank and Trust Company..... | 452,000. |
|--|----------|

| | |
|--------------------------------------|----------|
| First National Bank of Chicago | 252,000. |
|--------------------------------------|----------|

Portland,

| | |
|---------------------------------------|----------|
| First National Bank of Portland | 111,000. |
|---------------------------------------|----------|

Boston,

| | |
|-------------------------------------|----------|
| First National Bank of Boston | 156,000. |
|-------------------------------------|----------|

New York,

| | |
|--------------------------|---------------|
| National City Bank | \$ 1,033,000. |
|--------------------------|---------------|

| | |
|---------------------------------|----------|
| Chemical Bank and Trust Company | 489,000. |
|---------------------------------|----------|

| | |
|---------------------------|----------|
| Chase National Bank | 566,000. |
|---------------------------|----------|

| | |
|-----------------------------|----------|
| Bankers Trust Company | 126,000. |
|-----------------------------|----------|

| | |
|------------------------------|----------|
| Guaranty Trust Company | 255,000. |
|------------------------------|----------|

| | | |
|--------------------------------------|----------|---------------|
| First National Bank of New York..... | 171,000. | |
| Lee, Higginson & Company | 250,000. | |
| Irving Trust Company | 265,000. | |
| Commercial National Bank | 118,000. | |
| Chatham Phenix National Bank..... | 12,000. | 3,285,000. |
| <hr/> | | |
| Total..... | | \$ 6,361,000. |

CASH CAPACITY OPENING DECEMBER 9th, 1931

| | |
|-----------------------|---------------|
| Immediate Cash | \$ 6,361,000. |
| <hr/> | |
| Free Securities | \$ 42,000. |
| <hr/> | |

December 9th

Disbursements

| | |
|--|---------------|
| Advance to Intercoast Sales Corporation..... | 6,000. |
| <hr/> | |
| | \$ 6,355,000. |

Dec. 31

Deduct—Excess of Disbursements over Receipts

| | |
|--------------------------------------|------------|
| December 10th, to December 31st..... | 1,775,000. |
| <hr/> | |

Available close of business December 31st.....\$ 4,580,000.

Jan. 31

Add—Excess of Receipts over Disbursements

| | |
|-----------------------------------|------------|
| January 1st to January 31st | 1,936,000. |
| <hr/> | |

Available close of business January 31st.....\$ 6,516,000.

Feb. 29

Deduct—Excess of Disbursements over Receipts

| | |
|-------------------------------------|---------|
| February 1st to February 29th | 62,000. |
| <hr/> | |

Available close of business February 29th.....\$ 6,454,000.

Notes:

Amounts not included above—payable dates unknown :

| | |
|--|---------------|
| 1 Cash Value of Intercoast Sales Corporation Net | |
| Assets | \$ 1,310,000. |
| <hr/> | |

(Inter-Continental Corporation Investment and
Advances total \$1,899,000.)

| | |
|---|-------------|
| 2 Special Fund #1 (Payable to A.P.G.)..... | \$ 792,000. |
| 3 Minority Interest in Bank of America of Cali- fornia | \$ 38,000. |

| | | |
|---|---|-------------|
| 4 | In addition to anticipated advances to California Lands, Inc. provided for in above statement further advances in June 1932 are estimated to be required of approximately | \$ 500,000. |
| 5 | Liquidating Dividend of Farm Mortgage Holding Company, including portion applicable against loans to Stewart | \$ 885,000. |
| 6 | Balance in Bank of America, N.T. & S.A. Transamerica Savings account shown above is held subject to Capital Company requisition of all or part thereof at some future date..... | \$ 400,000. |
| 7 | Loans to be taken over from California State Life Insurance Company (\$287,000. in April 1932 and \$20,000. in June 1932)..... | \$ 307,000. |
| | | [341] |

INTER-CONTINENTAL CORPORATION

Loans and Securities

At Close of Business December 8, 1931.

| | Amount of Loan | Value of Collateral | Collateral Value Required | Excess Collateral |
|--|-------------------|------------------------|------------------------------|-------------------------|
| Domestic Banks | | | | |
| Chase | \$ 5,950,000. | \$ 7,840,000.A | \$ 7,840,000. | \$ |
| Chemical | 1,350,000. | 2,067,000.A | 2,067,000. | |
| Continental | 4,575,000. | 6,201,000.A | 6,201,000. | |
| First National, Boston | 700,000. | 958,000.A | 904,000. | 54,000. |
| First National, Chicago | 1,600,000. | 2,056,000.A | 2,000,000. | 56,000. |
| Guaranty | 1,000,000. | 1,400,000.A | 1,312,000. | 88,000. |
| National City | 5,075,000. | 6,461,000.A | 6,386,000. | 75,000. |
| <hr/> | | | | |
| Total Domes- tic Banks | \$20,250,000. | \$26,983,000. | \$26,710,000. | \$273,000. ¹ |
| <hr/> | | | | |
| Transamerica International Corp. | | | | |
| | \$ 1,374,000. | \$ 2,435,000. | \$ 2,435,000. | |
| <hr/> | | | | |
| Total Loans | \$21,624,000. | \$29,418,000. | \$29,145,000 | |
| <hr/> <hr/> | | | | |

¹ All National City and Bancamerica-Blair Corporation.

| | Amount of Loan | Value of Collateral | Collateral Value Required | Excess Collateral |
|--------------------------|-------------------|------------------------|------------------------------|----------------------|
| Free Securities | | | | |
| New York | \$ | 42,000. | | \$ 42,000. |
| | | <hr/> | | <hr/> |
| Net Excess or Free | | | | \$315,000. |

Free Securities—Non Collateral

| | | |
|---------------------|----|---------------|
| New York | \$ | 683,000.A |
| San Francisco | | 151,000.A |
| Foreign | | 306,000. |
| | | <hr/> |
| | | \$ 1,140,000. |

Total All Securities\$30,600,000.

Deduct:

(A) Other Holding Companies Securities in
Loans and Free.....\$14,215,000.

Value of Inter-Continental, Coast Company and
Transamerica International Securities\$16,385,000.

National City Bank, N.Y.

Free (192,544 shares
at 47)\$ 9,049,568.

Bancamerica-Blair Corp.

Free (311,240 shares
at 1)\$ 311,240.

[Endorsed]: Filed April 21, 1943. [342]

Securities and Exchange Commission
Washington

Securities Exchange Act of 1934

Release No. 1950

United States of America, Before the Securities
and Exchange Commission

At a regular session of the Securities and Exchange
Commission, held at its offices in the City of
Washington, D. C., on the 22nd day of Novem-
ber, A. D., 1938.

In the Matter of
Proceeding under Section 19 (a) (2) of the Secu-
rities Exchange Act of 1934, as amended, to
determine whether the registration of

TRANSAMERICA CORPORATION
CAPITAL STOCK, \$2 PAR VALUE

should be suspended or withdrawn

ORDER FOR HEARING AND DESIGNATING
OFFICER TO TAKE TESTIMONY

File No. 1-2964

[343]

For Immediate Release Friday, November 25,
1938.

It appearing to the Commission that Transamer-
ica Corporation is the issuer of Capital Stock, \$2
par value, and that said Transamerica Corporation
registered 11,590,784 shares of such stock on the
New York Stock Exchange, the Los Angeles Stock

Exchange, and, by amendment, on the San Francisco Stock Exchange, all national securities exchanges, by filing on or about August 7, 1937, an application on Form 24 signed for the Corporation by John M. Grant, President, with the said exchanges and with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934, as amended, and pursuant to Rule JB1 (now Rule X-12B-1) as amended, promulgated by the Commission thereunder, which application became effective September 10, 1937; and

The Commission having reasonable grounds to believe that Transamerica Corporation has failed to comply with the provisions of Section 12(b) of the Securities Exchange Act of 1934, as amended, the rules, regulations, Form 24 and the Instructions thereto, promulgated by the Commission thereunder, in that the application for registration on Form 24 and the amendments thereto, filed by said Corporation contain false and misleading statements of material [344] facts, including financial statements of said Corporation and its subsidiaries, which do not correctly reflect the true financial condition of the Corporation and its subsidiaries, all as hereinafter more particularly set forth;

The false and misleading statements which the Commission has reasonable grounds to believe exist in the application on Form 24 and the amendments thereto being more particularly as follows:

I. Item 4(b) and Item 11, Col. G call for certain information with respect to all parents of the registrant. The Instructions to Form 24 define the term "parent" to include a person in control of the

registrant and the term "control" is defined to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

The Commission has reasonable grounds to believe that in 1934 general proxies, to remain in full force and effect, unless revoked, for a term of seven years, were delegated to a Committee composed of A. P. Giannini, John M. Grant and L. M. Giannini, that such proxies were voted at the annual meeting of stockholders on March 29, 1934, and were in effect at the date of the application on Form 24, and that at such date these proxies conferred upon A. P. Giannini, John M. Grant and L. M. Giannini the power to direct the management and policies of the registrant. It therefore appears to the Commission that the failure in Item 4(b) and Item 11, Col. G to disclose the committee composed of A. P. Giannini, John M. Grant and L. M. Giannini as a parent of the registrant constitutes an omission of a material fact.

II. Item 28 and Item 29 call for information with respect to the remuneration paid by the registrant and its subsidiaries to certain of its officers, directors and employees.

The Commission has reasonable grounds to believe that on January 20, 1930, the sum of \$1,400,000 was placed on the books of Bankitaly Company of [345] America (then a subsidiary of Transamerica Corporation) to the credit of A. P. Giannini; that of this \$1,400,000 all but \$792,000 had been paid to A. P.

Giannini, by September, 1931, at which time counsel for the then existing management of Transamerica Corporation advised that further payment would be illegal; that thereafter subsequent to the change in management in 1932, A. P. Giannini withdrew from the balance of \$792,000 the following sums:

| | | |
|------|-------|--------------|
| 1932 | | \$134,826.58 |
| 1933 | | 132,896.92 |
| 1934 | | 100,596.24 |
| 1935 | | 251,952.03 |
| 1936 | | 65,914.28 |

It appears to the Commission that the failure to disclose these facts in Items 28 and 29 renders registrant's response to these items materially misleading.

III. With respect to the "Balance Sheet" of Transamerica Corporation as of December 31, 1936—

A. In Schedule VI the figure \$1,171,714.56 is set forth as a charge to "Paid-In Surplus" in 1936 under the caption "Charge resulting from cancellations and redistribution of capital stock."

The Commission has reasonable grounds to believe that of this amount \$1,124,724.78 represents commissions and other monies paid by Transamerica Corporation to Associated American Distributors, Inc. (at that time a wholly-owned subsidiary of Inter-Continental Corporation which was itself a wholly-owned subsidiary of Transamerica Corporation), in connection with the following activities:

From 1934 to April 1937, Associated American Distributors, Inc. engaged in the business of solicit-

ing orders to purchase Transamerica Corporation stock on the various stock exchanges on which such stock was listed. It does not appear that in any case Associated American Distributors, Inc. solicited orders for the [346] purchase of capital stock held by Transamerica Corporation. The solicitations were effected by means of contracts entered into by Associated American Distributors, Inc. with independent dealers and through a large number of salesmen employed directly by Associated American Distributors, Inc. Associated American Distributors, Inc. paid commissions to the dealers and to its salesmen for the orders obtained and, to encourage retention of the stock so purchased, additional commissions were paid in proportion to the duration of "placements." To support these activities, Transamerica Corporation paid the following amounts to Associated American Distributors, Inc.: In 1934, \$336,857; in 1935, \$891,202.17; in 1936, \$1,124,724.78. These payments were treated by Associated American Distributors, Inc. as current earnings and were set up on its books as income in the years received.

In the light of the facts set forth above, it appears to the Commission that the commission and other monies paid to Associated American Distributors, Inc., in the amount of \$1,124,724.78 in 1936, represents a current expense properly chargeable to profit and loss and that registrant's treatment of this item as a charge to "Paid-In Surplus" and its failure to reflect this item as a current expense with a consequent reduction in "Earned Surplus" renders the "Balance Sheet" and Schedule VI materially misleading.

IV. With respect to the "Profit and Loss Statement" of Transamerica Corporation—

A. Schedule VI sets forth as charges to "Paid-In Surplus" under the caption "Charge resulting from cancellations and redistribution of capital stock" the figures \$495,152.72 in 1934, \$891,202.17 in 1935 and \$1,171,714.56 in 1936.

The Commission has reasonable grounds to believe that of these figures \$336,857 in 1934, \$891,202.17 in 1935, and \$1,124,724.78 in 1936 represent commissions and other monies paid by Transamerica Corporation to Associated American Distributors, [347] Inc. (then a wholly-owned subsidiary of Inter-Continental Corporation which was itself a wholly-owned subsidiary of Transamerica Corporation) in connection with the activities described above in paragraph III-A. In the light of the facts and for the reasons set forth above in paragraph III-A, it appears to the Commission that registrant's treatment of these items renders the profit and loss statements for 1934, 1935, and 1936 materially misleading.

V. With respect to the "Balance Sheet" of Inter-America Corporation as of December 31, 1936—

A. Under the caption "Reserves—For liability and possible loss under outstanding contract of guaranty", and in Schedule V relating to additions and charges to "Reserves", there is set forth the figure \$9,302,381.82. The accompanying Note states that this amount relates to a contract of guaranty given to Bank of America N.T. and S.A. in connection with certain assets of the Bank.

The Commission has reasonable grounds to believe that certain facts having a material bearing on this matter are as follows:

In 1931, in the course of an examination of Bank of America N.T. & S. A., the national bank examiners classified certain assets of the Bank in the face amount of approximately \$35,214,000 as losses and doubtful accounts of such unsatisfactory character as to require their elimination from the Bank's balance sheet. Under three contracts dated June 26, 1931, December 31, 1931, and February 13, 1932, Bank of America N.T. & S.A. and Corporation of America (both of which were at that time 99.65% owned by Transamerica Bank Holding Company, itself a wholly-owned subsidiary of Transamerica Corporation), entered into agreements which provided that Bank of America N.T. & S. A. "agrees to sell, transfer and set over and does hereby sell, transfer and set over to the Corporation, and the Corporation agrees to purchase and does hereby purchase from the Bank" all such assets. As consideration [348] for these assets, Corporation of America agreed to pay the face amount of \$35,214,000. To secure performance Corporation of America pledged with the Bank the assets purchased together with additional collateral. Corporation of America failed to give effect on its books to the assets acquired by these contracts of purchase and sale or to reflect any direct liability thereunder, but apparently treated the obligation arising under the contracts as a guaranty by setting up a reserve from capital surplus in an amount approximately equal

to the aggregate purchase price under the contracts.

In 1933, the three contracts were transferred to Transamerica Bank Holding Company, and Transamerica Bank Holding Company by a resolution of its Board of Directors, dated August 30, 1933, agreed to "assume all of the obligations of Corporation of America under those three certain contracts between said Corporation of America and Bank of America N.T. & S.A." In connection with this transfer, Corporation of America eliminated the reserve set up to cover its obligation under the contracts, then aggregating approximately \$34,994,-376.57, and a reserve in the same amount appeared on the books of Transamerica Bank Holding Company. At a "Special Stockholders Meeting" on April 20, 1935, the name of Transamerica Bank Holding Company was changed to Inter-America Corporation. From time to time Bank of America N. T. & S. A. reduced the item set up on its books to reflect the obligation of Inter-America Corporation under the three contracts by a write-up of unrelated assets and by various other means as set forth below under paragraphs VII to XI, and XV to XVII, both inclusive.

In the light of the facts set forth, it appears to the Commission that the items "Reserves—For liability and possible loss under outstanding contract of guaranty" together with the accompanying Note, Schedule V, and the "Balance Sheet" are materially misleading:

1. In treating the contracts described and the obligation of Inter-America Corporation thereunder as a guaranty rather than as a purchase and sale

which should have been recorded by setting up the assets purchased with a corresponding direct liability for the purchase price and, in view of the character of the assets, a reserve for the losses which would be borne by Inter-America Corporation; [349]

2. In that the amount set up as "Reserves" for this obligation does not reflect the true amount of the liability due nor the possible losses under the contracts;

3. In the use of the term "recoveries" in Schedule V as charges to the "Reserve" originally set up to cover Inter-America's obligation under the three contracts, in that the term "recoveries" fails to indicate and falsifies the true nature of the reduction of Inter-America's obligation by conveying the impression of actual cash recoveries on assets written down, whereas in fact the "recoveries" were accomplished by the write-up by Bank of America N. T. & S. A. of unrelated assets as set forth below in paragraphs VII to XI and XV to XVII, both inclusive.

VI. With respect to the "Balance Sheet" of Transamerica General Corporation as of December 31, 1936—

A. Under the caption "Investments in Securities of Affiliates" and in Schedule II there is set forth the figure \$8,982,180.20 as the carrying value of the investment in the capital stock of Banca d'America e d'Italia.

The Commission has reasonable grounds to believe that certain restrictions imposed by the Italian

Government upon the transfer of any profits or other funds from Italy to any other country materially affects this investment. It therefore appears to the Commission that it is materially misleading to set forth the figure \$8,982,180.20 as the carrying value of the investment in the capital stock of Banca d'America e d'Italia without indicating the effect that the restrictions referred to above may have upon the investment.

VII. With respect to the "Combined Report of Condition" of Bank of America N. T. & S. A., First National Bank in Reno, Bank of America (California) as of December 31, 1936—

A. The item "Loans and discounts" under "Assets" and in Schedule E is stated to be \$539,899,100.65. This figure includes, among other things, loans in the amount of \$304,674,551.73 on "farm lands" and "other real estate." The Commission has [350] reasonable grounds to believe that the item of \$539,899,100.65 includes estimated losses and doubtful accounts aggregating in excess of \$8,000,000 and slow accounts in excess of \$125,000,000 held by Bank of America N. T. & S. A. Registrant has failed to disclose these losses, doubtful items and slow accounts in the "Report of Condition", either in Schedule E or elsewhere in the registration statement, has failed to provide any reserve for such losses and doubtful accounts, and, in the supplementary data furnished in accordance with paragraph I(5) of the Instructions as to Financial Statements in the Instruction Book for Form 24,

has affirmatively stated that there are no losses on loans and discounts not provided for.

B. "United States Government obligations, direct and/or fully guaranteed" and "Other bonds, stocks and securities" are set forth under "Assets" and in Schedule F and Schedule G at \$478,019,-771.38 and \$175,078,108.60, respectively. The Commission has reasonable grounds to believe that these items include United States Government and Municipal securities held by Bank of America N. T. & S. A. which were written up in 1935 and 1936 to the extent of approximately \$14,000,000 and which at the date of the "Report of Condition" included an unrealized appreciation of approximately \$9,000,000. The registrant has failed to disclose this fact in either Schedule F, Schedule G, the supplementary data furnished in accordance with paragraph I(5) of the Instruction Book for Form 24, or elsewhere in the registration statement.

The only provision for a reserve, captioned "Reserve for contingencies", is set at \$2,049,928.01. The Commission has reason to believe that \$1,971,058.48 of this figure is applicable to Bank of America N. T. & S. A., and that of this \$1,971,058.48, approximately \$1,460,000 is a reserve for self-insurance. The Commission further has reason to believe that this reserve is misleading because of its inadequacy— [351]

1. In failing to provide for losses and doubtful accounts of Bank of America N. T. & S. A. other than loans on "farm lands" and "other real estate" included in the "Assets" to the extent of approximately \$8,000,000;

2. In failing to provide sufficient reserves for the \$304,674,551.73 of loans on "farm lands" and "other real estate";

3. In failing to provide for losses on real estate other than bank premises held by Bank of America N. T. & S. A. to the extent of approximately \$1,600,000;

4. In failing to provide sufficient depreciation for bank premises, furniture, and fixtures of Bank of America N. T. & S. A.;

5. In failing to provide for losses on bonds and other securities held by Bank of America N. T. & S. A. to the extent of approximately \$400,000 and for losses on other asset items to the extent of approximately \$300,000.

D. "Undivided profits—net" is set forth at \$22,503,612.05. The Commission has reasonable grounds to believe that this figure is false and misleading—

1. In that it includes approximately \$9,000,000 of unrealized appreciation resulting from the \$14,000,000 write-up in 1935 and 1936 of United States and Municipal securities held by Bank of America N. T. & S. A.;

2. In failing to include a reserve for losses and doubtful accounts, losses on real estate, depreciation of bank premises, furniture and fixtures of Bank of America N. T. & S. A. and losses on securities and other assets in excess of \$13,000,000;

3. In that the total of (1) and (2) would wipe out that portion of the "Undivided profits—net" which may be attributed to Bank of America N. T.

& S. A. and would require a reduction of the "surplus" account of Bank of America N. T. & S. A.

[352]

VIII. With respect to the "Combined Report of Earnings and Dividends" for Bank of America N. T. & S. A., First National Bank in Reno and Bank of America (California)—

A. For the year ended December 31, 1935—

1. The items "Recoveries on bonds, stocks and other securities" and "Profits on securities sold" are stated to total \$14,942,992.67. The Commission has reason to believe that this figure includes unrealized appreciation of approximately \$7,000,000 resulting from an approximately \$8,000,000 write-up in 1935 of United States Government and Municipal securities held by Bank of America N. T. & S. A., and, in addition, includes a substantial amount of unrealized appreciation resulting from the write-up of certain Transamerica Corporation stock held by Bank of America N. T. & S. A. as collateral for written off loans, and that the inclusion of this unrealized appreciation as income is false and misleading;

2. The provision for loss and depreciation on "banking house, furniture and fixtures" is set at \$1,055,223.40. The Commission has reason to believe that this figure is inadequate;

3. The deficiencies set forth in (1) and (2) are reflected in the statement of net profits and undivided profits and render these items false and misleading to an amount in excess of \$7,000,000. It appears that the dividends paid in 1935 by Bank of

America N. T. & S. A. were more than \$3,500,000 in excess of its actual current earnings.

B. For the year ended December 31, 1936—

1. The item "Recoveries on bonds, stocks and other securities" is stated to be \$6,309,400.26. The Commission has reasonable grounds to believe that this figure includes unrealized appreciation of approximately \$2,000,000 resulting from a \$6,000,000 write-up in 1936 of United States Government and Municipal securities held by Bank of America, N. T. & S. A., and, in addition, includes a substantial amount of unrealized appreciation resulting from the write-up of certain Transamerica Corporation stock held by Bank of [353] America N. T. & S. A. as collateral for written off loans, and that the inclusion of this unrealized appreciation as income is false and misleading;

2. The report of Earnings and Dividends further appears misleading in that no provision from earnings has been made for doubtful accounts and uncollectible foreign credits held by Bank of America N. T. & S. A. which the Commission has reasonable grounds to believe aggregated approximately \$3,700,000;

3. The provision for losses and depreciation on "banking house, furniture and fixtures" is set at \$1,082,748.86. The Commission has reasonable grounds to believe that this figure is inadequate.

4. The deficiencies set forth in (1), (2) and (3) are reflected in the statement of net profits and undivided profits and render these items false and misleading to an amount in excess of \$6,000,000. It ap-

pears that the dividends paid in 1936 by Bank of America N. T. & S. A. were more than \$1,500,000 in excess of its actual current earnings.

IX. With respect to the "Balance Sheet" of California Lands, Inc., as of December 31, 1936—

A. Schedule VII relating to "Surplus" sets forth as an addition to "Earned Surplus" under the caption "Profit on sale of assets purchased from affiliate" the sum of \$297,918.26. The accompanying Note states that this amount represents the excess of realization over the cost to California Lands, Inc. of an undivided one-half interest in certain notes, parts of notes, deficiency judgments, etc., theretofore written off on the books of Bank of America N. T. & S. A. and purchased from the Bank by Inter-America Corporation and from Inter-America Corporation by California Lands, Inc.

The Commission has reason to believe that certain facts having a material bearing on this matter are as follows: [354]

On February 1, 1933, Bank of America N. T. & S. A. sold to Corporation of America (both of which were at this time 99.65% owned by Transamerica Bank Holding Company, itself a wholly-owned subsidiary of Transamerica Corporation), for a consideration of \$250,000, all of the Bank's charged off assets, including those to be charged off up to July 1, 1933. This agreement was transferred for the same consideration to Transamerica General Corporation and then to Transamerica Bank Holding Company (both wholly-owned subsidiaries of Transamerica Corporation). On January 2, 1934,

Bank of America N. T. & S. A. sold to Transamerica Bank Holding Company for a consideration of \$50,000 all of the assets of the Bank charged off from July 1, 1933, to July 1, 1937. At a Special Stockholders Meeting on April 20, 1935, the name of Transamerica Bank Holding Company was changed to Inter-America Corporation.

On October 1, 1936, Inter-America Corporation transferred the charged off assets covered by the two aforementioned agreements to California Lands, Inc. and Capital Company (both wholly-owned subsidiaries of Transamerica General Corporation which corporation was 100% owned by Transamerica Corporation) for an aggregate consideration of \$500,000.

On July 14, 1937, California Lands, Inc. and Capital Company transferred these same assets less \$1,486,185.67 collected by Inter-America Corporation (for the account of California Lands, Inc. and Capital Company) to Bank of America N. T. & S. A. for a consideration of \$6,500,000. Thus, in 1937, Bank of America N. T. & S. A. paid \$6,500,000 for a portion of the same assets which the Bank had originally sold in 1933 and 1934 for \$300,000.

As part of this same transaction, Transamerica Corporation entered into an agreement guaranteeing the Bank against loss to the extent of \$6,500,000 on the charged off assets repurchased.

In the light of the facts set forth above, it appears to the Commission that the figure \$297,918.26 set forth in Schedule VII as "Earned Surplus" under [355] the caption "Profit on sale of assets pur-

chased from affiliate", together with the accompanying Note, and the inclusion of this amount in the "Earned surplus—deficit" in the "Balance Sheet" are materially misleading.

X. With respect to the "Balance Sheet" of Capital Company as of December 31, 1936—

A. Schedule VII relating to "Surplus" sets forth as an addition to "Earned Surplus" as "Profit on sale of assets purchased from affiliate" the sum of \$297,919.29. The accompanying Note states that this amount represents the excess of realization over the cost to Capital Company of an undivided one-half interest in certain notes, parts of notes, deficiency judgment, etc.,—theretofore written off on the books of Bank of America N. T. & S. A. and purchased from the Bank by Inter-America Corporation and from Inter-America Corporation by Capital Company.

In the light of the facts sets forth above under paragraph IX-A, it appears to the Commission that the figure \$297,919.23 set forth in Schedule VIII as "Profit on sale of assets purchased from affiliate" together with the accompanying Note, and the inclusion of this amount as "Earned Surplus" in the "Balance Sheet" are materially misleading.

It appearing to the Commission that pursuant to Section 13 (a) and (b) of the Securities Exchange Act of 1934, as amended, and Rules KA1 and KA2 (now Rules X-13A-1 and X-13A-2) promulgated by the Commission thereunder, Transamerica Corporation filed on or about June 27, 1938, its annual report on Form 24-K for the fiscal year ended De-

cember 31, 1937, signed for the Corporation by John M. Grant, President; and

The Commission having reasonable grounds to believe that said Transamerica Corporation has failed to comply with the provisions of Section 13 (a) and (b) of the Securities Exchange Act of 1934, as amended, the rules, regulation, Form 24-K and the Instructions thereto, promulgated by the Commission thereunder, in that the annual report on Form 24-K filed by said Transamerica Corporation contains false and misleading statements of material facts including financial statements of said Transamerica Corporation and its subsidiaries, which do not correctly reflect the true financial condition of the Corporation and its subsidiaries, all as hereinafter more particularly set forth; [356]

The false and misleading statements which the Commission has reasonable grounds to believe exist in the annual report referred to above being more particularly as follows:

XI. With respect to the "Balance Sheet" of Transamerica Corporation as of December 31, 1937—

A. Note B referring to the items captioned "Marketable Securities" and "Investments in Securities of Affiliates" states that securities having a market value of \$1,338,835 and investments in securities of affiliates having a carrying value of \$5,636,576.32 were pledged as security "(1) in connection with a contract of guarantee and (2) on an option to purchase certain securities." Note I referring to "Contingent Liabilities" states that "At December

31, 1937, the Corporation was reported as being continently liable [sic] under certain conditions of contract in the amount of \$3,838,128.74."

1. The Commission has reasonable grounds to believe that certain additional facts having a material bearing on the "contract of guarantee" referred to in Note B are as follows:

In connection with the transactions described above under paragraph IX-A, in which a portion of the charged off assets of Bank of America N. T. & S. A., originally sold by the Bank in 1933 and 1934 for an aggregate consideration of \$300,000, were repurchased by the Bank on July 14, 1937, from California Lands, Inc. and Capital Company for a consideration of \$6,500,000, Transamerica Corporation entered into an agreement guaranteeing the Bank against loss to the extent of \$6,500,000 on the assets repurchased. The reference in Notes B and I to a "contract of guarantee" apparently refers to this agreement.

In the light of the facts set forth above in this paragraph and in paragraph IX-A, and in the light of the apparent disparity between the actual value of the assets repurchased by the Bank and the amount of recovery guaranteed by Transamerica Corporation, it appears to the Commission that Notes B and I and the "Balance Sheet" are grossly inadequate to reflect the nature of Transamerica's obligation under the contract of guarantee. [357]

2. The Commission has reasonable grounds to believe that certain additional facts having a material bearing on the "option to purchase certain securities" referred to in Note B are as follows:

In July, 1937, Bank of America N. T. & S. A. purchased from Transamerica Corporation 56,600 shares of stock of National City Bank at the then market price of \$48 per share. It appears that the stock purchased was set up on the books of Bank of America N. T. & S. A. at \$2,716,800, the purchase price, and that payment was made by crediting \$2,716,800 to Inter-America Corporation to reduce by that amount the balance of the \$35,214,000 obligation originally undertaken by Inter-America Corporation under the circumstances set forth in paragraph V-A. As part of the contract of purchase and sale of National City Bank stock, Transamerica Corporation agreed to repurchase the stock at \$48 per share over a period of 5 years at the rate of 11,320 shares each year, and pledged an additional block of 18,400 shares to secure this agreement. It further appears that on December 31, 1937, the market value of National City Bank stock was approximately \$27 per share. The reference in Note B to "an option to purchase certain securities" apparently relates to this transaction.

It appears to the Commission that the foregoing transaction was a device employed in an attempt to reduce or eliminate the balance of the obligation originally undertaken by Inter-America Corporation, and that the designation and treatment of this transaction as an "option" and the failure to disclose the additional information set forth above and the circumstances surrounding this transaction render Notes B and I and the "Balance Sheet" materially misleading.

B. In Schedule VIII the figure \$444,000 is set forth as a charge to "Paid-In Surplus" in 1937 under the caption "Contribution to Associated American Distributors (Incorporated) in connection with redistribution of capital stock."

The Commission has reasonable grounds to believe that this amount represents commissions and other monies [358] paid by Transamerica Corporation to Associated American Distributors, Inc., (then a wholly-owned subsidiary of Inter-Continental Corporation which was a wholly-owned subsidiary of Transamerica General Corporation, itself a wholly-owned subsidiary of Transamerica Corporation) in connection with the activities described above in paragraph III-A.

In the light of the facts and for the reasons set forth above in paragraph III-A, it appears to the Commission that registrant's treatment of this item renders the "Balance Sheet" and Schedule VIII materially misleading.

XII. With respect to the "Profit and Loss Statement" of Transamerica Corporation—

A. In Schedule VIII the figure \$444,000 is set forth as a charge to "Paid-In- Surplus" in 1937 under the caption "Contribution to Associated American Distributors (Incorporated) in connection with redistribution of capital stock."

The Commission has reasonable grounds to believe that this amount represents commissions and other monies paid by Transamerica Corporation to Associated American Distributors, Inc., (then a wholly-owned subsidiary of Inter-Continental Cor-

poration which was a wholly-owned subsidiary of Transamerica General Corporation, itself a wholly-owned subsidiary of Transamerica Corporation) in connection with the activities described above in paragraph III-A.

In the light of the facts and for the reasons set forth in paragraph III-A, it appears to the Commission that registrant's treatment of this item renders the "Profit and Loss Statement" and Schedule VIII materially misleading.

XIII. With respect to the "Balance Sheet" of Inter-America Corporation as of June 30, 1937—

A. Under the caption "Reserves—For liability and possible loss under outstanding contract of guaranty", and in Schedule VI relating to additions and charges to "Reserves", there is set forth the figure \$8,561,099.82.

In the light of the facts set forth above under paragraph V-A, it appears to the Commission that the items "Reserves—For liability and possible loss under outstanding contract [359] of guaranty", Schedule VI, and the "Balance Sheet" are materially misleading:

1. In treating the contracts described in paragraph V-A and the obligation of Inter-America Corporation thereunder as a guaranty rather than as a purchase and sale which should have been recorded by setting up the assets purchased with a corresponding direct liability for the purchase price, and, in view of the character of the assets, a reserve for the losses which would be borne by Inter-America Corporation;

2. In that the amount set up as "Reserves" for this obligation does not reflect the true amount of the liability due nor the possible losses under the contracts;

3. In the use of the term "recoveries" in Schedule VI as charges to the "Reserves" originally set up to cover Inter-America's obligation under the three contracts, in that such term fails to indicate the true nature of the reduction of Inter-America's obligation.

XIV. With respect to the "Balance Sheet" of Transamerica General Corporation as of December 31, 1937—

A. Under the caption "Investments in Securities of Affiliates—Banks" there is set forth the figure \$9,374,148.06. In Schedule II it is stated that the investment in the capital stock of Banca d'America e d'Italia is carried on the balance sheet at the amount of \$8,982,321.85.

In the light of the facts set forth above under paragraph VI-A, it appears to the Commission that it is materially misleading to set forth the figure \$8,982,321.85 as the carrying value of the investment in the capital stock of Banca d'America e d'Italia without indicating the effect that the restrictions referred to in paragraph VI-A may have upon investment.

XV. With respect to the "Balance Sheet" of California Lands, Inc., as of December 31, 1937—

A. Schedule IX relating to "Surplus" sets forth as an [360] addition to "Earned Surplus" under the caption "Profit on sale of assets purchased

from affiliate" the sum of \$3,595,120.54. The accompanying Note states that of this amount \$345,120.54 represents the excess of realization over the cost to California Lands, Inc. of an undivided one-half interest in certain notes, parts of notes, deficiency judgments, etc., theretofore written off on the books of Bank of America N. T. & S. A. and purchased from the Bank by Inter-America Corporation and from Inter-America Corporation by California Lands, Inc., and that the remaining \$3,250,000 represents the share of California Lands, Inc. in \$6,500,000, which on July 14, 1937, Bank of America N. T. & S. A. agreed to pay to California Lands Inc. and Capital Company for the right to future recoveries on these same assets. The Note further states that in connection with this purchase Transamerica Corporation entered into an agreement whereby it guaranteed that the Bank would recover the amount of \$6,500,000 at an annual rate of \$1,300,000.

In the light of the facts set forth above under paragraph IX-A, it appears to the Commission that the figure \$3,595,120.54 set forth in Schedule IX as "Earned Surplus" under the caption "Profit on sale of assets purchased from affiliate" together with the accompanying Note, and the inclusion of this amount as "Earned Surplus" in the "Balance Sheet" are materially misleading.

XVI. With respect to the "Balance Sheet" of Capital Company as of December 31, 1937—

A. Schedule IX relating to "Surplus" sets forth as an addition to "Earned Surplus" under the cap-

tion "Profit on sale of assets purchased from affiliate" the sum of \$3,595,119.56. The accompanying Note states that of this amount \$345,119.56 represents the excess of realization over the cost to Capital Company of an undivided one-half interest in certain notes, parts of notes, deficiency judgments, etc., theretofore written off on the books of Bank of America N. T. & S. A. and purchased from the Bank by Inter-America Corporation and from Inter-America Corporation by Capital Company, and that the remaining \$3,250,000 represents the share of Capital Company in \$6,500,000 which on July 14, 1937, Bank of America N. T. & S. A. agreed to pay to California Lands, Inc. and Capital Company for the right to future recoveries on these same assets. The Note further states that in connection with this purchase Transamerica [361] Corporation entered into an agreement whereby it guaranteed that the Bank would recover the amount of \$6,500,000 at an annual rate of \$1,300,000.

In the light of the facts set forth above under paragraph IX-A, it appears to the Commission that the figure \$3,595,119.56 set forth in Schedule IX as "Earned Surplus" under the caption "Profit on sale of assets purchased from affiliate" together with the accompanying Note, and the inclusion of this amount as "Earned Surplus" in the "Balance Sheet" are materially misleading.

The Commission having reasonable grounds to believe that Transamerica Corporation has failed to comply with the provisions of Section 12(b) and

Section 13(a) and (b) of the Securities Exchange Act of 1934, as amended, the rules, regulations, Form 24, Form 24-K, and the Instructions thereto, promulgated by the Commission thereunder, in that the application for registration on Form 24, the annual report on Form 24-K and the amendments thereto, filed by said Transamerica Corporation contain financial statements of Transamerica Corporation and its subsidiaries, which do not correctly reflect the true financial condition of Transamerica Corporation and its subsidiaries, as hereinafter more particularly set forth:

XVII. It appears to the Commission that the general policy of Transamerica Corporation and its subsidiaries with respect to the manner of creation and treatment of certain "reserves", and the adequacy thereof, is improper in the following respects:

A. In the elimination of "reserves" on the books of certain companies and the creation of fictitious "reserves" in similar or substantially similar amounts on the books of other companies in the Transamerica group for the purpose of utilizing such "reserves" to absorb losses with consequent distortion of the true financial condition of the separate corporate entities and of the entire group as a whole; in particular, with respect to the "reserves" set up on the "Balance Sheets" of Transamerica General Corporation as of December 31, 1936, and December 31, 1937, "for real estate losses and contingencies of controlled affiliates" in the amounts of \$6,861,814.19 in 1936 and \$1,700,050.22

in 1937, and \$5,034,583.95 in 1936 and \$1,168,002.25 in 1937, for Capital Company and California Lands, Inc. respectively; [362]

B. In that the amount of the reserves provided on the books of the various companies in the Transamerica group is materially inadequate; in particular, the "Combined Report of Condition" of Bank of America N. T. & S. A., First National Bank in Reno, and Bank of America (California) as of December 31, 1936, shows "Loans and discounts" in the amount of \$539,899,100.65 which includes, among other things, loans in the amount of \$304,674,551.73 on "farm lands" and "other real estate". The only reserve in this "Combined Report of Condition" is designated as "Reserve for contingencies" and is set forth at \$2,049,928.01, of which approximately \$1,460,000 is a reserve for self-insurance, leaving a balance of \$589,928.01. In its "Balance Sheet" as of December 31, 1936, Capital Company carried "Real Estate Held for Resale," at \$51,379,652.11, which amount represented "Land, Buildings and Improvements", and as of the same date, California Lands, Inc. carried "Real Estate and Equipment Held for Resale" at \$31,357,098.76, which amount included "Land, Buildings and Improvements" at \$31,335,825.76, with no reserve on the books of either company applicable to such assets. As of the same date, Occidental Life Insurance Company (a wholly owned subsidiary of Transamerica General Corporation, itself a wholly owned subsidiary of Transamerica Corporation) showed on its books

“mortgage loans on real estate” and “balance due on property sold under contract” in the amounts of \$8,175,516.57 and \$3,856,986.03, respectively, with no reserves applicable thereto. These various items of loans, discounts, and investments in real estate aggregate \$634,668,354.12, against which there is an aggregate reserve of but \$589,928.01.

In that because of the nature of the “reserves” referred to above under A, it was improper to charge losses and expenses against such “reserves”;

C. In the treatment of losses and expenses which were not present at the date of a readjustment of accounts but resulted from events occurring subsequent thereto as charges to certain reserves created at the time of such readjustment. [363]

XVIII. It further appears to the Commission that registrant, in its application for registration on Form 24 and in its annual report for 1937 on Form 24-K, has failed to file financial statements for itself and its subsidiaries certified in accordance with the requirements of paragraph II of the Instructions as to Financial Statements in the Instruction Books for Form 24 and Form 24-K, respectively.

It being the opinion of the Commission that the hearing herein ordered to be made is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Securities Exchange Act of 1934, as amended;

It Is Ordered, pursuant to Section 19(a)(2) of said Act, that a public hearing be held to determine whether Transamerica Corporation has failed to

comply with Section 12(b) and Section 13(a) and (b) of the Securities Exchange Act of 1934, as amended, the rules, regulations and forms promulgated by the Commission thereunder, in the respects set forth above; and if so, whether it is necessary or appropriate for the protection of investors to suspend for a period not exceeding twelve months or to withdraw the registration of said Corporation's Capital Stock, \$2 par value, on said New York Stock Exchange, Los Angeles Stock Exchange and San Francisco Stock Exchange;

It Is Further Ordered, pursuant to the provisions of Section 21(b) of the Securities Exchange Act of 1934, as amended, that for the purposes of such hearing, Henry Fitts, an officer of the Commission, is hereby designated to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith authorized by law;

It Is Further Ordered, that the taking of testimony in this hearing begin on the 16th day of January, 1939, at 10:00 A.M. in Room 1101, Securities and Exchange Commission Building, 1778 Pennsylvania Avenue, N. W., Washington, D. C. and continue thereafter at such time and place as the officer hereinbefore designated may determine.

By the Commission.

[Seal]

FRANCIS P. BRASSOR,
Secretary. [364]

State of California,

County of Los Angeles—ss.

Homer N. Boardman, being first duly sworn says: That affiant is a citizen of the United States and a resident of the County of Los Angeles, is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 9720 Sunset Boulevard, Beverly Hills, California; that heretofore on or about the 21st day of August, 1942, affiant served the within and attached "Order for Hearing and Designating Officer to Take Testimony, file No. 1-2964" made and given by the United States Securities and Exchange Commission, on the 22nd day of November, 1938, in that certain proceeding entitled "In the Matter of Proceeding under Section 19 (a) (2) of the Securities Exchange Act of 1934 as amended to determine whether the registration of Transamerica Corporation capital stock \$2.00 par value should be suspended or withdrawn" on the attorneys for all of the defendants in the case of Rose Papantonio vs. Amadeo P. Giannini, et al, No. 1490-H, pending in the District Court of the United States Southern District of California, Central Division, by placing a true copy thereof in an envelope addressed to said attorneys at their respective business addresses as follows: Keyes & Erskine, Herbert W. Erskine and Louis Ferrari, at 625 Market Street, San Francisco, California; Bascigalupi Elkus and Salinger and Claude M. Rosenberg at 300 Montgomery Street, San Francisco, California; Tanner, Taft and O'Dell at 1011 I. N. Van Nuys Bldg., 210 W. 7th

Street, Los Angeles, California; Edmund Nelson, Room 410, Bank of America Bldg., 650 South Spring Street, Los Angeles, California; Russ Avery at 315 South Broadway, Los Angeles, California; Gordon Gray at Bank of America Building, San Diego, California; George G. Schilling and G. L. Berrey at Room 410 Bank of America Bldg., 650 South Spring Street, Los Angeles, California and Cosgrove & O'Neil and John N. Cramer, Rowan Bldg., 458 South Spring Street, Los Angeles, California, all of which said envelopes containing said copy and addressed to said attorneys as heretofore stated were sealed and the postage fully prepaid thereon and thereafter, on Friday, August 21, 1942, deposited by affiant in the United States Post Office at Beverly Hills, California, and that there is delivery service by United States mail at each of the places so addressed and that there is regular communication by mail between the place of mailing and each of the places so addressed.

HOMER N. BOARDMAN

Subscribed and sworn to before me, this May 29th, 1943.

CHAS. E. [Illegible]

Notary Public, Los Angeles
County, Calif.

My Commission expires May 9, 1946.

[Endorsed]: Filed May 31, 1943. [365]

In the United States District Court Southern
District of California, Central Division

No. 1490-H

ROSE PAPANTONIO, suing in her own behalf as
a shareholder¹ of TRANSAMERICA COR-
PORATION and in behalf of all other share-
holders of said corporation similarly situated,
Plaintiff,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI,
A. H. GIANNINI, AMADEO P. GIANNINI
(as Executor of the Last Will and Testament of
VIRGIL D. GIANNINI, Deceased), BANK
OF AMERICA NATIONAL TRUST & SAV-
INGS ASSOCIATION, a national banking as-
sociation (as Administrator With the Will An-
nexed of the Estate of JOHN M. GRANT, De-
ceased), GORDON GRAY, O. D. HAMLIN,
T. W. HARRIS, A. P. JACOBS, F. G.
STEVENOT, RUSS AVERY, P. A. BRICCA,
GEORGE J. DeMARTINI, W. N. LAGOMAR-
SINO, A. J. SCAMPINI, WILLIAM E.
BLAUER, LEON BOCQUERAZ, E. H.
CLARK, CHARLES N. HAWKINS, W. F.
MORRISH, A. J. MOUNT, ALFRED E.
SBARBORO, CHESTER H. LOVELAND,
P. C. HALE, JAMES A. BACIGALUPI,
ARMANDO PEDRINI, GEORGE A. WEB-
STER, E. J. NOLAN, C. R. BELL, W. W.
GARTHWAITE, GEORGE N. ARMSBY,

LOUIS FERRARI, V. SCIALOJA, THEODORE M. STUART, HERBERT E. WHITE, CHARLES DeY. ELKUS, and CHARLES DeY. ELKUS, WILLIAM S. HOELSCHER, CLIFFORD F. HOFFMAN, C. J. SMITH, VERNON C. WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI, and CLAIRE GIANNINI HOFFMAN, transacting business as co-partners under the firm name and style of WALSTON & CO., and AMADEO P. GIANNINI (as the Executor of the Last Will and Testament of VIRGIL D. GIANNINI, a deceased member of said co-partnership); WALSTON & CO., a co-partnership; TRANS-AMERICA CORPORATION, a corporation, et al.,

Defendants. [366]

JUDGMENT AND DISMISSAL

Plaintiff having filed her Second Amended Complaint herein pursuant to the order of the court directing her so to do, defendants, separately or in groups, filed motions directed at said Second Amended Complaint, to wit, motions to dismiss; for an order requiring plaintiff to separately state causes of action in separate counts; for a more definite statement or bill of particulars, and to strike, and the same were argued by counsel and submitted upon such oral argument and written points and authorities theretofore and thereafter filed in support of and in opposition to said motions. The court having duly considered said motions and being

fully advised in the premises, on April 16, 1943, filed its Memorandum of Conclusions, and on the same day made its minute order directing that each and all of the motions filed on behalf of the respective defendants to dismiss the Second Amended Complaint be granted, and further ordering that on or before June 1, 1943, plaintiff might file application for leave to file a Third Amended Complaint, provided that such application have attached thereto her proposed further amended pleading, and also be accompanied by a memorandum of supporting points and authorities, and provided further that at least ten days' notice shall be given of the hearing of said application.

It appearing to the court that plaintiff has not filed her application for leave to file a further amended pleading, nor has she asked for or obtained any extension of time therefor, and that the time within which to file such application has now expired.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the action as above entitled be and the same is hereby dismissed.

It Is Further Ordered and Decreed that defendants do [367] have and recover of and from plaintiff their respective costs herein to be taxed by the Clerk in the manner prescribed by law and the rules of this court. Taxed at \$30.00.

Dated, June 9, 1943.

H. A. HOLLZER

District Judge

Approved as to form pursuant to Rule 8.

VINCENT ANTHONY MARCO

HOMER N. BOARDMAN

PERCY V. CLIBBORN

By HOMER N. BOARDMAN

Attorneys for Plaintiff

Judgment entered Jun. 9, 1943. Docketed Jun. 9, 1943. C. O. Book 17, Page 467. Edmund L. Smith, Clerk, By Wayne Thomas, Deputy.

[Endorsed]: Filed Jun. 9, 1943. [368]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
OF APPEALS UNDER RULE 72 (b). [369]

Notice is hereby given that Rose Papantonio suing in her own behalf as a share holder of Transamerica Corporation and in behalf of all other shareholders of said corporation similarly situated, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 9th day of June, 1943.

VINCENT ANTHONY MARCO

HOMER N. BOARDMAN

PERCY V. CLIBBORN

Attorneys for appellant, Rose Papantonio, suing in her own behalf as a shareholder of Trans-

america Corporation and in behalf of all other shareholders of said corporation similarly situated. [370]

[Endorsed]: Filed and mailed copies to attorneys for drafts, Sep. 7, 1943. Edmund L. Smith, Clerk. By Theodore Hocke, Deputy.

[Title of District Court and Cause.]

PORTIONS OF REPORTER'S TRANSCRIPT
OF PROCEEDINGS ON HEARING DESIGN-
NATED BY APPELLEES

The plaintiff and appellant hereinafter sets forth each and all of the portions and parts of the reporter's transcript of the proceedings on the hearings before the court which were stenographically reported and which have been designated by the appellees for use in the Appellate Court in printing the record and for use of said appellees.

Said parts and portions of said reporter's transcript are as follows:

I.

Los Angeles, California, Tuesday, June 23, 1942;
10:00 A. M.***5 Afternoon Session
2:00 O'Clock*** [371]

II.

Mr. Cramer:***

If the court please, I think that I have taken far more time than I expected on my motion to dismiss.

I want to say this: I think that what we have said will materially shorten our rebuttal and also some other of my motions. I am now prepared, if it meets the court's convenience, to argue very briefly the second of our motions, namely, the motion for a separate statement of transactions; and if it meets the court's approval, I will——

The Court: As to that motion, perhaps I ought to interrupt and ask the other side: Will it be conceded that some of the directors, if liable at all, may be liable with respect to the so-called salary transaction and may not be liable with respect to one or both of the remaining transactions?

Mr. Boardman: If your Honor please, I would not wish to go so far as to agree with that observation. The complaint when what we consider properly viewed, in effect charges a conspiracy between all of the defendants and, of course, if any one of them aided in any part of it they adopted it all at the beginning, even though they aided at the last end of it. Under that theory I would not want to admit or concede that there might be parts of this, some of the items involved in the counts, where certain defendants would be liable and not in others. But I will say that, as far as the motion to separate is concerned which, of course, is purely a matter of form, we have no objection, if the court wishes it stated that way, to separate them. We are not contesting that particular thing. We are leaving it up to the court to determine.

The Court: Yes. Well, I think, then, I should

settle that now. I think they ought to be separated.

Mr. Boardman: Well, that will end that.

The Court: Because, while it is conceivable that it may ultimately be held that all defendants are liable on some [372] theory of conspiracy with reference to matters taking place before they became directors, it is also conceivable that at a trial quite a different result might follow.

Mr. Boardman: They might be separated; that is correct.

The Court: That disposes of everything except the matters of more particularly setting forth certain features.***66-67

III.

Mr. Ferrari***

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IV.

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We have also made a motion for a separate statement and a motion to strike. The theory of the motion for a separate statement was that we defendants——

The Court: We have already ruled favorably on that.

Mr. Ferrari: Yes. Yes; and I am not going to discuss it. My motion to strike was simply to strike out those causes of action of the complaint which occurred before my clients were directors and those that happened after they ceased to be such, and I could not see any answer to that motion to strike. And therefore, on behalf of my defendants, we submit that they are entitled to have this motion to dismiss granted, without leave to amend. They should not be haled into court again.

The Court: I am probably asking something that goes outside the record, but it occurs to me that it may be of some aid in considering the redrafting the complaint. I am laboring, at least, under the impression that somewhere in the years past we read a news item to the effect that the so-called A. P. Giannini group were ousted from control of Trans-america and some other group came in. I recognize that I have no right, of course, to make any ruling upon these motions based upon what I read in the newspapers, but it just occurred to me that, so far as possible, all these legal questions ought to be clearly and squarely presented on the face of the pleadings if this can be done; and [373] having in mind that there are these contentions being advanced on behalf of the respective defendants that center around portions of the complaint bearing on this matter of the alleged domination of Mr. A. P. Giannini of the board and, furthermore, the inability of plaintiff, to use a slang phrase, to get a square deal from the board thus dominated, if it be a fact *there* there was a period of time when the directors were elected by the so-called opposition, as I believe the newspapers reported. I think it only—well, appropriate, if these questions are to be tested at the outset of the case, that in explaining the reasons why this delay has taken place, why nothing has been done for the benefit of Trans-america and the stockholders, that whatever the essential facts are—not in detail, obviously not—but something, I think, should be said that would help to explain the failure to bring a lawsuit of that

kind during, say, a period when the so-called opposition was in control of the board, if that is the proper term to use. It is true that such matters could be raised by way of answer and one might wait until trial to test them out; but if it be a fact, as we have been led to believe by the newspapers, that there was a period of time when the so-called dummy directors acting at behest, allegedly, of Mr. A. P. Giannini, were not in control of Transamerica I think that circumstance should not only be disclosed in the bill as amended, but, of course, a recital of the ultimate facts upon which the plaintiff was justified and the failure of Transamerica to act during that period.

Is there any disagreement about the accuracy of that news item?

Mr. Ferrari: I will state, if the court please, for the benefit of counsel that that is a fact; that during the period from 1929, as shown in the chart, Transamerica was dominated by the so-called Walker directors. They were not only not dominated by Mr. Giannini, but they were absolutely hostile to him, [374] and this whole question of the compensation came up before that hostile board of directors, was considered and they decided that the arrangement should not be disturbed and that the contract should not be set aside.

The Court: Now, of course, you have gone beyond answering my question. I was only concerned with the fact about the change in the board because the complaint itself, I think—

Mr. Ferrari: I was just giving facts.

The Court: —is raising an issue as to who were the directors and whether or not they were dominated by Mr. A. P. Giannini; and if it be a fact, which perhaps plaintiff's counsel can verify, that the so-called A. P. Giannini crowd was ousted and that control of the directorate was acquired by another group, it might just as well be disclosed in the amended bill; and then, whatever you think is appropriate to justify the failure of the so-called opposition board to act on behalf of Transamerica.

Mr. Boardman: We will be glad, your Honor, to investigate that matter and take care of it in the amended complaint in conformity with the facts.

The Court: Do you recall reading a news item?

Mr. Boardman: No; I do not. I was not interested in the Gianninis at that time

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V.

Los Angeles, California, Thursday, June 25, 1942;
10:00 A. M.

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VI.

Afternoon Session. 2:00 O'Clock

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VII.

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The Court: The comments I am about to make constitute tentative views and do not represent any final conclusion that I have reached. I make them so that, I hope, as to assist counsel in determining what, if any, further comments should be made on their part; in other words, to apprise you as to what

is pre- [375] sently passing through my mind. It is quite obvious that, not having made that exhaustive study which must ultimately be made of the case, I may be convinced that these tentative views should be altered. In other words, as yet, in the light of the argument so far as it has progressed, these thoughts seem to me to express the conclusions that might ultimately be reached.

It is to be observed that in Paragraph I of the complaint it is disclosed that Transamerica was organized in October of 1928. Turning now to Paragraph XX, it is there shown that such defendants as are sued herein as having been former directors or who are now directors of Transamerica, for the most part did not become such until 1929, although in a few instances some of them became directors about the same time that Transamerica was organized in 1928. Nevertheless, in Paragraph XXI it is alleged that the defendants A. P. Giannini, L. M. Giannini and Mr. Grant, now deceased, during all times mentioned in the complaint—it may be there has been a clerical misprision but the expression is unqualified—“all of the times mentioned” in the complaint selected the officers and directors of Transamerica, controlled and dominated its business policies and affairs. Perhaps that should be construed as meaning at all times from and after the organization of Transamerica.

Paragraph XXII of the complaint discloses that Bancitaly was organized in June, 1919 by the defendants A. P. Giannini, Hale and Bacigalupi.

Paragraph XXIII alleges that the defendant A. P. Giannini dominated and controlled the directors of Bancitaly corporation until the organization of Transamerica.

Paragraph XXIV alleges that in April of 1927 Bancitaly corporation entered into a certain salary contract with A. P. Giannini to pay him for his services as president thereof five per cent of its net profits, with a guaranteed minimum of \$100,000 per annum. [376]

Paragraph XXV asserts that, pursuant to this salary contract and for the period ending January 1, 1929, the defendants A. P. Giannini and the directors of Bancitaly corporation, that is to say, A. P. Giannini, caused and directed and Bancitaly corporation permitted to be entered on its records certain entries of purported credits in favor of A. P. Giannini amounting to \$925,000, and corresponding entries of liabilities of Bancitaly corporation in that amount, and that such entries were knowingly made upon false, fictitious, inflated and untrue book profits.

Paragraph XXVI alleges that in December of 1928 A. P. Giannini and co-defendant directors and officers of Transamerica knowingly permitted Transamerica to acquire its assets, that is, to acquire the assets of Bancitaly corporation, assume all its liabilities, including the aforementioned salary contract and the aforementioned purported liabilities evidenced upon the corporate records of Bancitaly corporation.

And then in Paragraph XXVII it is alleged that,

commencing January 1, 1927—please note that date—and ending about January 1, 1930 A. P. Giannini and the co-defendant directors and officers of Transamerica knowingly permitted entries to be made on the corporate records of the latter corporation as purported credits in favor of A. P. Giannini aggregating not less than \$5,000,000, and corresponding entries upon the records of Transamerica corporation and liabilities in the same amount; and it is further charged in the same paragraph that said purported credits on the books of Transamerica were false and do not correctly represent five per cent of the net profits, but were in excess thereof, and by said defendants knowingly computed upon false, fictitious, inflated and untrue book profits.

I think it will be recognized that Transamerica could hardly be charged with what was going on prior to the organization of Transamerica, namely, as to what was allegedly taking place with [377] reference to the business and affairs of the Bancitaly corporation. Perhaps there is a clerical misprision somewhere, but it strikes me that under the facts alleged no legal conclusion may properly be drawn charging Transamerica and its officers and directors with any wrong doing because of what may have been done by the officers and directors of Bancitaly corporation.

In Paragraph XXVI—have I referred to that paragraph, Mr. Reporter?

The Reporter: Yes, sir.

The Court: Yes; and I have also referred to Paragraph XXVII. Is that the last paragraph to which I made reference?

The Reporter: Yes, your Honor.

The Court: Then in Paragraph XXVIII we have, briefly, the charge that each item of these alleged credits to A. P. Giannini evidenced sums purportedly payable to him which were by him unearned and for which he gave no consideration.

Now, again, it occurs to me that the making of that contract in April of 1927 and the entries upon the records of Bancitaly corporation up until approximately December, 1928, when its assets were taken over and its liabilities assumed by Transamerica, may not legally be chargeable as a wrong doing on the part of anybody, excepting at most those who allegedly perpetrated this—well, alleged fraud upon Bancitaly corporation.

We come now to Paragraph XXIX and there it is asserted that, commencing January 1, 1927 and ending about January 1, 1939—I repeat the words “commencing January 1, 1927,” A. P. Giannini caused and the co-defendant directors and officers of Transamerica knowingly permitted Transamerica to pay him \$5,000,000 on account of said wrongful credits, to the detriment of Transamerica.

Of course, Transamerica having had no existence until at least December, 1928, could not during any period antedating De- [378] cember of 1928 have paid Mr. A. P. Giannini anything; nor can it, at least, be held as a legal conclusion from the facts set forth in the complaint that the officers or directors of Transamerica caused or permitted to be done any of the acts complained of until, at least, Transamerica

corporation was organized. And so I think it is essential that it be alleged what is involved or what is charged as misconduct prior to the formation of Transamerica in order, at least, that there may be squarely presented on the face of the bill the legal question to which I have been referring, namely, can any legal liability attach to the officers and directors of Transamerica for what Bancitaly did.

In Paragraph XXX it is alleged that A. P. Giannini, L. M. Giannini and Mr. Grant, now deceased, caused, and the co-defendant directors and officers knowingly permitted, the aforementioned transactions to be reflected by the records of Transamerica kept by an involved, intricate and complex system of accounting in conflict with the usual, customary, proper and recognized principles of the science of accounting beyond the knowledge and understanding of plaintiff with respect to such subject, and that such transactions were covered, disguised and concealed beyond discovery by entries and records made under false, misleading and untrue names and designations, not required by and in conflict with the usual, customary, proper and recognized principles of accounting procedure.

Up to that point the complaint deals with the alleged wrongful acts on the part of directors and officers of Bancitaly corporation and alleged wrongful acts on the part of directors and officers of its successor corporation, namely Transamerica.

And next, Paragraph XXXI brings in what, to my mind, is a new subject matter, alien and foreign

to the transactions previously complained of. At this point, perhaps counsel can be of assistance. Will you refer me to that portion of the complaint wherein it is alleged the circumstances disclosing how the alleged fraud was discovered or otherwise explaining the delay?

Mr. Boardman: I think you will find it at——

Mr. Cramer: XLIV.

Mr. Boardman: ——XLIV, on pages 28, 29 and 30, I think.

The Court: Yes. In Paragraph XLIV it is alleged that plaintiff was at all times ignorant of the matters complained of until about April 27, 1939, when for the first time her attention was called to a certain proceeding then pending before the Securities and Exchange Commission of the United States involving an issue as to whether A. P. Giannini had caused to be filed certain statements containing false and misleading information in support of applications for the registration of shares of Transamerica corporation on various stock exchanges; that in such proceeding certain evidence was brought out tending to establish suspicious circumstances indicating possible irregularities in the conduct of the business and affairs of Transamerica corporation by A. P. Giannini and other defendant directors and officers; that in such proceeding before the Commission these alleged irregularities were developed slowly through detailed examinations and audits of the corporate records and books of account of Transamerica corporation and its many subsidiary corporations and associations; that these were developed by expert

accountants for said Commission; that these proceedings before the Commission are still being contested, are pending and undetermined.

That after being advised of these suspicious circumstances indicating possible irregularity in the conduct of the business and affairs of Transamerica Corporation in the manner previously noted, the plaintiff not knowing the truth or falsity of such information and desiring to determine if actionable wrongs had in fact been committed in the management of the business affairs of Transamerica corporation immediately proceeded to and has at all times ever since diligently investigated and attempted to [380] ascertain the true and actual facts with respect to the transactions and wrongs here alleged, and thus far has been unable to fully complete her investigation and is still proceeding therewith.

When I first read this Paragraph XLIV, some days ago, I made a notation on the margin opposite the concluding paragraph of the paragraph numbered XLIV, of the following: "Do these recitals mean that the plaintiff as yet is unable to assert that the acts complained of actually occurred?"

Mr. Boardman: It means with respect to additional acts, if any.

The Court: I am afraid that there is phraseology here that needs to be revamped because, at any rate, it puts that question in my mind.

I gather from the statement of counsel that in paragraph XLIV we are to find all that the plaintiff has to tell us by way of showing how the matters herein charged came to be discovered by her, and,

in addition, to explain the delay in the bringing of this lawsuit. My present thought is that an action that charges misconduct of the kind herein described, which admittedly is grave and must stamp those guilty thereof as criminals and, to borrow the theme which Shakespeare long ago expressed, would rob these defendants of their good name, which I think most people recognize is more precious than anything else, possibly in the estimation of some as precious as life itself—when a court is confronted with a complaint involving charges of that kind, I think it has a duty to see to it not only that the names of citizens in the community shall not lightly be bantered about, that reputations shall not lightly be tossed into the heap of disgrace, but to require that all reasonable requirements necessary to justify the interposition of the hands of equity shall be made. As it presently appears this complaint, I think, falls short of disclosing sufficient facts to justify what seems to be a rather bald or naked [381] conclusion that plaintiff first discovered the matters complained of about April, 1939, or to explain away that what was ascertained in April, 1939 was not equally known or its equivalent notice was not had prior thereto.

During the argument I asked whether this case was one that would be tried on an agreed statement of facts or upon purely documentary evidence which would lead primarily to questions of law as to the meaning and effect of either the agreed statement or the documentary proof, and counsel very frankly said that it would likely prove a bitter contest around

the testimony of individuals. I think it is a fair inference from that candid reply that a defendant sued in an action of this kind will be subjected to all those risks and dangers that go with the passing of time and the concomitant frailties of human recollection. It does strike me, as I view the matter at present, that before men are subjected to defending a case to be tried under those conditions that the plaintiff should disclose with more particularity what it was, in substance, that came to her knowledge or notice which, in effect, amounted to the discovery for the first time that the acts herein charged were committed. And there, again, I think that it is important to distinguish and segregate between what occurred on the part of Bancitaly, what occurred on the part of Transamerica after its organization in December, 1928, and what occurred with respect to the transactions that are described in the paragraphs beginning with No. XXXI and continuing down to and including Paragraph XXXIV. In other words, as to the alleged wrongful acts arising out of the formation and operating the business of Walston & Co. I am not as yet convinced that they form part of either a single conspiracy or of any joint wrongdoing, that is, joint as the the co-defendants who admittedly had no membership in the firm of Walston & Co or any interest therein. [382]

And we note that, beginning with Paragraph XXXV and continuing down to Paragraph XXX-IX, inclusive, we have set forth what, to me, appear to be, again, transactions, an alleged series of wrongful acts disconnected from the acts complained of

relative to the so-called salary contract and clearly disconnected with those particular defendants alleged to have been involved in some misconduct respecting the operations of Walston & Co.

And then, maybe I have misconstrued this complaint. While counsel for defendants have referred to it as alleging three separate and distinct alleged wrongs, I seem to get the idea that, beginning with Paragraph IX, still another alleged wrongful transaction is alleged. Perhaps a more careful reading of the paragraphs beginning with Paragraph XXXV will convince me that, from that paragraph to the end, we are concerned only with what might be termed a single cause of action. I am not clear in my own mind relative thereto.

I am prompted to ask counsel for plaintiff: Is it your position that the matters complained of relative to the operations of Smith and Mallory, the loans made in connection with their transactions, the profits realized thereby are recoverable therein under the doctrine that you discussed this forenoon in the Fleishhacker case?

Mr. Boardman: Yes.

The Court: Now, finally, as I presently view the complaint, while it might be said that it asserts in effect that, beginning sometime about April, 1927, A. P. Giannini, L. M. Giannini and Mr. Grant, now deceased, decided to enrich themselves at the expense of Bancitaly corporation and that later, following the organization of the successor corporation, Transamerica corporation, they decided to enrich themselves at the expense of the latter corporation;

that such a charge could not support the conclusion that, therefore, the co-defendants have been jointly engaged in what [383] might be called a single enterprise. If we were to so hold, it seems to me it would lead to this result: That any time a group of individuals decided to enrich themselves at the expense of any others with whom they may become associated that thereafter every venture in which they thus engage, regardless how numerous those ventures, regardless over how long a period of time the different ventures are conducted, and everybody who had anything to do with helping those individuals to enrich themselves in any one of these numerous ventures, all would become joint tortfeasors of the same alleged wrong, and one could see how that doctrine could lead to, well, a piling up of countless lawsuits, all under the caption of a single case and with many of the defendants not only having no interest in certain of the ventures, but the decision as to whether or not some of the ventures were lawful or proper might not have any bearing as to whether any of the later ventures were lawful or proper.

For example, in this very complaint, as yet I see no basis upon which any decision relative to the so-called contract, salary contract transaction, will have the slightest bearing in determining the legality or illegality of the so-called Walston & Co. venture, and vice versa. For the purpose of this discussion it is perfectly conceivable that plaintiff could make out a case against those involved in the so-called Walston & Co. operations; but I am unable to see how a de-

cision favorable to plaintiff on that subject matter will have the slightest bearing in determining the legality or illegality of the so-called salary contract, or what the directors of Bancitaly did originally, or what the directors of Transamerica did thereafter, respecting that venture. And then, as to the venture wherein Smith and Mallory were involved, the ramifications pertaining to Bankitaly Mortgage Company, we might even concede for the purpose of this discussion that those involved in the ventures having to do with the Bankitaly Mortgage [384] Company might be compelled to return the sums allegedly wrongfully diverted; and here, again, I do not see how a decision favorable to plaintiff on that subject matter would help us to decide whether any of the defendants should be held liable either on the salary contract deal or the Walston & Co. operations.

I say these are the views that I have in the light of the discussions thus far presented as to the fair meaning of the bill of complaint as it is presently drawn.

I had intended asking one of the counsel on the plaintiff's side—I believe it was Mr. Berrey who advanced the contention that it was necessary, to enable plaintiff to state a cause of action against the administrator of the estate of Grant, to file a claim against this estate, and that there being no allegation to that effect in the complaint no ground for prosecuting this lawsuit against that Estate has yet been shown.

But as to the other counsel, I think that in the light of what I have said, what ought to be done is

to allow plaintiff the opportunity of segregating portions of any further amended bill along the lines that I have outlined, unless counsel desire to file some further brief in the matter. I will consider further that question if you have something to add to what has already been argued.

Mr. Boardman: If the court please, in respect to the question of these items in the complaint that we follow separate items like the salary transaction, the Walston & Co. transaction, and the Mallory trust transaction, with respect to the court's suggestion that perhaps all are independent and, in a sense, that they should not be united in one complaint, while I feel that we have not exactly done justice to that point, I would like to present a memorandum on it if the court would grant us a little time. I am sincere about that. I think that rule— [385]

The Court: I wonder if perhaps this would not be a way of getting at it and perhaps minimizing the time and the labors of all of us: I have allowed—and I am not certain that this would answer the purpose, but I seem to think that it would—namely, that if an amended complaint were to be filed which would consist of several counts, one in which you would embody as much of the present complaint as you think you still desire to retain, and then a series of additional counts in which you might split up these several different transactions, as they presently appear to me to be, at least, that portion of the problem that I have tried to outline will clearly be presented as fully as the plaintiff can. In other words,

you will have done it both the way you now think it ought to be done and the way, at least, I think it is necessary to segregate it; and that will afford an opportunity to the other side to make separate and distinct attacks upon several counts in the bill. And in that same connection I am suggesting that I think we ought to have an opportunity, at least, to rule upon the question as to what liability you claim arose prior to the formation of Transamerica, what liability arose following its formation, and that in turn there, I think some effort should be made to permit those particular defendants who admittedly were directors only up until 1932 to have an opportunity at least, to make their attack because obviously it is conceivable that it might ultimately be held that liability exists as against them only for the limited periods that they were directors.

And—oh, yes. During the argument in response to a question that, while it was clearly not connected with anything disclosed on the face of the complaint, yet I do think it has to do with a case involving charges as serious as we have here, that if it be a fact, I understand the counsel for plaintiff are prepared to make available record proof of the fact that there was [386] a period when these men allegedly selected and dominated by A. P. Giannini and one or two others were removed from the board and a so-called opposition regime elected. I take it that, while it may be argued that possibly matters of that kind can be brought out in the trial, yet it does seem to me that in a case of this type, to the extent that there are facts not open to controversy upon which one

side or the other might rely as a legal basis either for bringing a suit or for defending against it, that it would be to the interest of everybody concerned to bring out those facts on the face of the bill.

Mr. Boardman: As I indicated before, your Honor, we are perfectly willing to investigate that situation and treat it in the complaint in the manner that we think it should be treated so that any question of law can be presented that defendants or any of them might feel desirable. I have no personal reasons, myself, to slide over any transaction in this kind of a case or in any kind of a case. If we plead over, why, probably something ought to be done about it but I don't like to say just what, without first making investigation. But I do think if those facts exist it would be quite proper to let your Honor pass on the legal effect of them on the face of the complaint.

The Court: For example, I have this thought in mind: Suppose the minutes of a particular annual meeting of Transamerica corporation disclose that A. P. Giannini and others, with the holding of various proxies, voted for certain directors and that the directors for whom he voted were, at least as to a majority thereof, defeated and another ticket elected; I say, I am assuming that the records of the corporation's annual meeting might readily disclose that fact and the minutes either of a stock holders' meeting or of a directors' meeting thereafter held might further disclose that there was some discussion had relative to this salary contract. [387]

Mr. Boardman: Of course, I don't know anything about that.

The Court: I appreciate that you don't. I am assuming that those records will be made available in order that whatever the facts may be and if there is any legal basis for either founding a lawsuit or sustaining a defense, that those facts might just as well be set forth in the complaint.

Mr. Boardman: I agree in principle with that, your Honor, but I can't say just how I would treat it, in advance, in a complaint.

The court: Am I correct in assuming that such counsel as represent the defendants having control of the records will make them available?

Mr. Ferrari: Yes, your Honor; in that particular we will be glad to do it.

Mr. Boardman: Now, as I said before, we have no objection to separating our complaint into counts on the various statements of the claims, but it occurs to me that in doing it we should have the advantage of knowing just what the court's decision is on the other questions, that is, if the court is ruling now or if those matters that are to be—I have understood that this was just a discussion.

The Court: Yes. I have outlined my tentative views with the thought that if you feel that you have something that you still ought to add, rather than file an amended complaint along the lines, that you might do so.

Mr. Boardman: No. We would gladly file that kind of a complaint, but in doing it we are still in

the dark on some of these questions that have been presented and have not been decided.

The Court: You are referring now as to the necessity for pleading that an appeal has been made to the stockholders? [388]

Mr. Boardman: That is the principal one; yes.

The Court: Or justifying the failure to do so. I am not convinced that the other side is right. In other words, I am presently impressed with the thought that we are here dealing with an equitable right, even though the matter is somewhat treated in both the former equity rules and in the New Federal Rules of Civil Procedure. Others have observed that the court promulgating these rules was treading on somewhat doubtful territory and that where a stockholder is given the right to redress a wrong, without an appeal the remaining stockholders, that the courts should not and will not modify that substantive right; and that it will be conceded that in the Act of Congress which authorized the Supreme Court to enact the Rules, and later on, the legislature, in allowing the court to revise the entire subject matter of Rules of Procedure, both at law and in equity, distinctly provided that no substantive rights should be invaded. So that I should want to reserve until after the amended complaint is filed my ultimate conclusion in that respect. I take it that the plaintiff is in no position to either allege or prove that an appeal was made to the other side?

Mr. Boardman: There was not.

The Court: So that it is not necessary at this stage of the case, in order to consider any further

amended pleading, to decide that question, because, to use a slang phrase, there isn't anything this plaintiff can do about it.

Mr. Boardman: No; but it might have a little bearing on what we might say in an amended complaint upon that subject, and, of course, I appreciate the remarks the court has already made.

The Court: Do you have in mind possible amplification as to why no appeal was made to the stockholders?

Mr. Boardman: It might be. Of course, we haven't made it. I say, we haven't expressly made it. I think the effect, [389] like we argue, is the same, but we could amplify it.

The Court: I see no reason why you should not do so because I might ultimately find myself changing the views that I presently have on that particular question.

Mr. Boardman: Yes. I understood, if I understand correctly, that you were presently or now inclined to think that it might not be necessary; is that it, may I ask?

The Court: That is correct, but I think that—I was about to observe that I see no prejudice in your stating anything further that you can as to why no appeal was made to the stockholders, even though my present view is that you need not do so. I mentioned that because, for example, if it should be held on further attack on the next amended bill that the respective motions which probably will be made will be sustained, at least, you will have pleaded as much as you can and not be in the position of perhaps

asking leave to further amend the bill, and then the court ruling as to whether or not the proposed amendment would make any difference in ruling, and so on. So I think, from the standpoint of what may ultimately prove effective all around, that in your further amended bill you might as well state the case as strongly as you can as to that proposition.

Mr. Boardman: Well I think I understand the court's views.

The Court: I understand that the reporter will transcribe these discussions.

Mr. Boardman: Of course, if there is to be more argument on this question of appealing to shareholders, I don't know what the defendants might, of course, wish to go into that further. But I wouldn't want to take it out of the—

Mr. Ferrari: We are satisfied with the situation as stated by the court.

Mr. Boardman: What?

Mr. Ferrari: We do not desire to argue any further at this time. [390]

Mr. Boardman: Oh, I see.

The Court: Mr. Berrey, do you still think you are right on that question of filing a claim in a case of this kind?

Mr. Berrey: Yes, if the court please. 318-338

VIII

(All the following are from the hearing of October 12th, 1942.)

Los Angeles, California,
Monday, October 12, 1942:
9:30 A. M.

IX

The Court: Before it is determined that you will need to do that, let me indicate certain views which will help you understand why I am asking plaintiff's counsel to open the discussion.

At the time of the last argument I made certain comments indicating, as you will recall, that the allegations of the first amended complaint, as I viewed them at that time, appeared to me to embrace at least three, if not four, separate and distinct causes of action; and I indicated what I considered the nature of those separate and distinct controversies and pointed out that according to the allegations of the bill, the pleading was insufficient to show legal justification for joining the same, but that, in any event, the points which were raised in opposition could more clearly be considered and determined if in further amending the bill these controversies which were described in the first amended bill were pleaded separately, without, however, prejudice to the right of plaintiff to add an additional count if you still were convinced that all of these separate controversies should, nevertheless, be combined in a single cause of action. 5-6

X

Now I observe that in the second amended complaint we still have a single count and the charge of conspiracy beginning with, I believe, sometime

in the year 1928; and then there have been set forth in various subdivisions various purported objects of this conspiracy; and then these are followed by other allegations [391] setting forth that the various acts were committed.

If my reading of this second amended complaint is accurate it would appear that, as distinguished from the first amended complaint, no reference is now made to any alleged wrong-doing occurring prior to the formation of Transamerica Corporation. I think it would help me in following this discussion if you pointed out why you have not made the segregation in this second amended complaint under separate causes of action as I interpreted what took place between court and counsel with respect to which I have just quoted from the transcript, that in the second amended complaint we were to have, in any event, separate and distinct counts even though you concluded to add as one count all of the acts complained of. I am particularly struck by this seeming departure from what I gathered was acceptance by counsel for plaintiff in connection with the drafting of the second amended complaint. 14, 15

IX

Mr. Boardman: May it please your Honor, of course, the court this morning in reading from the former proceeding covered, in general, several subjects. It is a little hard to assemble them and inasmuch as——

The Court: Would you like to borrow this transcript?

Mr. Boardman: Oh, no. I have a copy, your Honor. But inasmuch as it seems to me from the practice I have had in many years that we probably are tending to engage in a controversy over the merits of this case, as to why a pleading should be thus and so depends upon what knowledge the pleader has of the facts, and that might change from time to time. When we were here before we had a pleading that the court did not rule upon, as I understood it, but we discussed it and that is about all there was to it. That was one pleading. Since that time certain things have occurred that caused a change in the pleading, not in the fundamental facts of how the money or property of the Trans-america Corporation was used by these defendants, but the way [392] they did it and the legal theory upon which it was done. 16

XII

Mr. Boardman * * *

19

XIII

*** I want to say to the court and to opposing counsel that the facts that are alleged in the present complaint and the theory of the case is based, or are based upon the proceedings, the official proceedings before the Securities and Exchange Commission, and if it is necessary we will ask the court to take judicial notice of that record. * * *

21

XIV

Mr. Boardman * * *

32

XV

Now, if your Honor thinks that a suit against fiduciaries under the circumstances of this complaint, or anyone who does them, is more than one cause of action or more than one claim, I again say we will separate it. But I do not believe that is the law, that is the only difference. I recognize your Honor's authority and the reason for it—to make a clear presentation of the issues. Every defendant in this case has to answer every paragraph, anyway. They can't escape from it. Now, why separate it? There isn't any point in it that I can see. I don't mean to be arbitrary about it at all. If your Honor wants another kind of a pleading, I am willing to do it, but I did not think in view of the kind of a pleading it is, that your Honor would even think that that was necessary.

33, 34

XVI

Afternoon Session 1:00 O'clock. 47

XVII

The Court: I think it is unfortunate that in the drafting of this second amended complaint you did not make the segregation, because I think it would be a whole lot clearer. It would make [393] our discussion and our consideration of the questions clearer if you had made the segregation as you indicated that you would.

Mr. Boardman: Perhaps from your Honor's standpoint that might be true, but nevertheless, I am rather from the old school and I have always

thought that we had one cause of action, especially one for an accounting, that it could not be separated properly. Now, maybe if I am wrong about that, why, that is a simple matter.

The Court: Did you get the understanding from the discussion at the prior argument that there would be nothing to prevent you, for example, in your second amended complaint doing both, namely, including one count based upon the theory that there was no legal need for segregation, and then, however, additional counts in which the particular subjects that were pointed out as apparently relating to separate and distinct causes of action would be pleaded in separate counts? Did you get the impression that you could in this second amended complaint do that?

Mr. Boardman: No; I did not. I did not get that impression and the propriety of it did not occur to me; and the only reason for not separating them was that it was just simply a suit for an accounting and I thought that it was a very simple matter. I see now what the court has in mind, that it could be pleaded all in one count and possible segregated in other counts. Of course, that is something that did not occur to me. 54-55

XVIII 96-98

Mr. Cosgrove: If your Honor please, would you tolerate a suggestion from me?

The Court: Surely.

Mr. Cosgrove: Mr. Boardman has said that he has investigated, and asserts here that his client did

not receive a copy of the letter of December 9, 1931, and, of course, in view of that statement it would not be proper to ask him to allege that she did. There is such a letter. It is pleaded in the Abrams case that [394] it was sent out to all of the stockholders. Now, the records disclose that. If Mr. Boardman would plead the fact as disclosed by the records, that that letter was sent out, and plead that letter and deny that his client received it, he would enable this court to pass, as a matter of law, on the question raised by the statute of limitations as to whether or not those directors that were there and sent out this letter, signed by Bacigalupi, the president, and signed by Walker, the President of the board,—whether or not they were dealing at arm's length with Mr. Giannini and whether Mr. Giannini was at that time actually out and whether or not they were contesting with him the control of the board.

The Court: Do I understand you to say that the corporate records of Transamerica disclose that such a letter was sent to the stockholders or directed to be sent to all the stockholders?

Mr. Cosgrove: Yes; and we have an affidavit here supporting our motion that covers that matter.

Mr. Boardman: Not a corporate record.

Mr. Cosgrove: Sir?

Mr. Boardman: It was not a corporate record nor a corporate act.

Mr. Cosgrove: Well, we think it was a corporate act and we think the record discloses it was a corporate act.

Mr. Boardman: Well, I was advised otherwise.

Mr. Ferrari: It was an act of the then board of directors.

Mr. Cosgrove: Yes; it was sent out by them. The letter of the board of directors will disclose that itself.

The Court: Is there anything that discloses from the minutes or any other records of the corporation that such a letter properly was sent to all the stockholders?

Mr. Ferrari: An officer of the corporation who handled it has made affidavit to that effect, Mr. Campana, that it was sent to all the stockholders.

96-98 [395]

The above and foregoing portions of the reporter's transcript is tendered for filing herein, pursuant to Rule 75, Sub-division B of the Federal Rules of Civil Procedure and includes two copies of the same.

Dated: this 24th day of November, 1943.

VINCENT A. MARCO
HOMER N. BOARDMAN
PERCY V. CLIBBORN

Attorneys for Plaintiff and
Appellee.

[Endorsed]: Filed Nov. 24, 1943. [396]

DOCKET ENTRIES

1941

- Apr. 16—Fld compl by stockholders for an actg by directors Issd summ. Made Ja 5.
- Jun. 23—Ent ord placing on cal for 6/30/41 10 a.m. under Rule 16 FRCP Counsel notified.
- ” 30—Ent ord strik. from cal hrg Rule 16 FRCP
- Sep. 15—Ent ord plac. on cal 9/22/41 10 a.m. Rule 16. Not. counsel
- “ 22—Ent ord contin hrg per Rule 16(6) FRCP to 10/20/41 10 a. m.
- “ 23—Fld summons ret'd not exec
- Oct. 20—Ent ord cont to 11/17/41 10 a. m. hrg. per Rule 16 [6] FRCP.
- Nov. 17—Ent ord cont 12/15/41 10 a. m. hrg. purs. Rule 16 [6] FRCP.
- Dec. 15—Ent ord. contg. 12-29-41, 10 a. m. for fur. hrg. Rule 16 [6] FRCP.
- “ 29—Ent ord. strik. from cal hrg Rule 16 (6) as amended compl. fld. today.
- “ 29—Fld. First amended compl.

1942

- Jan. 2—Fld. prae plf. & iss'd summons on amended compl.
- Mar. 12—Ent ord transf cause to div of Judge Hollzer for all fur proceedgs. Notified counsel. Placed on cal of 4/6/42 for diep purs to Rule 16(6).

1942

- Mar. 27—Fld stip & ord exten time of deft Amadeo P. Giannini to 4/30/42 to move or plead.
- “ 30—Fld sep stips & ord thereon extend time of defts (1) A. H. Giannini et al (2) Transamerica corp (3) Bank of Amer Natl Trust & Savgs Assn (4) L. M. Giannini et al and (5) Charles De Y Elkers et al to 4/30/42 incl to plead.
- Apr. 3—Fld summons & ret of Mar thereon
- “ 6—Ent ord off cal for diep purs to Rule 16(6) as case soon to be at issue.
- “ 29—Fld 5 sep stieps & ords thereon ext time defts BK of Amer Natl Trust & Savgs Assn A. H. Giannini et al, L. M. Giannini et al, Charles De Y Elkus et al & Trans-Amer Corp to 5-4-42 to ans 1st amend compl or plead thereto.
- “ 30—Fld mo & no of mo of deft Amadeo P. Giannini, etc. to dismiss, for ord requir plf to state causes of action separately, for more defin stmt or B/P & to strike ret 5-21-42, & ord thereon approvg. Fld pts & auths in suppt of said mos.
- “ 30—Fld deft Herbert E. White's mos. to dismiss to strike, & for more defin stmt or B/P & notice ret 5-21-42. Fld pts & auths.

1942

May 4—Fld no & mos by defts Walston & Co., a copartnership, et al to dismiss for better stmt, to strike etc. ret 5-21-42. Fld pts & auths.

Fld no & mos by deft L. M. Giannini, et al, to dismiss etc ret 5-21-42. Fld pts & auths.

Fld answer of deft Trans-America Corp. Fld mos by deft A. H. Giannini, Wm. E. Blauer, et al (1) to dismiss the action (2) for order requiring plf to state separately causes of action (3) for a more defn stmt & B/P (4) to strike partns of compl. Fld pts & auths in suppt of mos. & no of mo for 5-21-42.

Fld mos of deft Bank of Amer NT&S Assn as Admin with will annexed of est of John M. Grant to (1) dismiss the action (2) for a more defn stmt or B/P a no of mo for 5-21-42.

Fld pts & auths in suppt of mo.

“ 19—Ent order pursuant to stip vacating hrg date of 5-21-42 on various mos. to dismiss etc & resettle hrg on said mos. for 6-16-42 & that plf file ans auths by 6-2-42 & movants file closing auths by 6-11-42. Not waived.

1942

- Jun. 2—Fld plfs brief re defts not to dismiss etc.
- “ 4—Ent Min Ord Cont to 6-23-42 hrg various Motions to dismiss, etc.
- “ 5—Ent Ord that defts have to 6-15-42 to file closing briefs on various mots.
- “ 15—Fld reply brief of defts L. M. Giannini et al in dupl. Fld reply deft H. E. White to plfs brief on mo to dis etc in dupl. Fld in dupl answerg pts & auths of Bk of America, etc. —241—242—284.
- [398]
- Jun. 15—Fld in dupl pts & auths of deft A. P. Giannini on mo to dis, etc.
Fld in dupl reply brief defts A. H. Giannini et al on Mos to dis.
Fld in dupl pts & auths defts Walston & co et al in reply to plfs pts & auths on mos to dis, etc.
- “ 23—Ent proc on hrg various motions to dismiss, etc & ent ord contg to 6-24-42 for fur hrg.
- “ 24—Ent proc on fur hrg on motions to dismiss, etc & ent ord contg to 6-25-42 for fur hrg.
- “ 25—Ent proc on fur hrg on motions to dismiss of various defts & ent ord that plf serve & file Amend compl within 60 days & that defts have 30 days thereafter to plead thereto.
- Aug. 17—Ent ord extend time to 8/21/42 incl to file amend compl.

1942

Aug. 21—Fld second amend compl. Fld pts & auths.

Sept. 2—Fld ord extdg time to plead to 9-15-42.

“ 15—Fld motions by defts to dismiss; for an ord requiring plf sep to state causes of action; for a more defin stmt or B/P; to strike; fld pts & auths thereon. Fld ans. deflt Transamerica corp. Fld mo deflt Bk of America, etc to dismiss for separate stmt of causes of action & more def stmt or B/P & notice ret 10-1-42. Fld pts & auths in suppl in dupl. Fld mos defts A. H. Giannini et al to dismiss; for separate stmt etc., for more defin stmt & B/P & to strike & notice ret 10-1-42. Fld pts & auths in supp in dupl. Fld mo defts Chas. de y. Elkus et al to dismiss; for separate stmt of Causes of Action & more def stmt or B/P & notice ret 10-1-42. Fld pts & auths in supp (dupl to come from S. F.) Fld mo defts A. P. Giannini etc to dismiss; for separate stmt etc., for more def stmt or B/P & to strike & notice ret 10-1-42. Fld pts & auths in supp in dupl. Fld mo H. E. White to dismiss; for separate stmt; for more defin stmt or B/P & to strike & notice ret 10-1-42. Fld pts & auths in supp in dupl.

1942

- Sept. 24—Ent ex parts proc's & ent ord cont all mot's on cal of 10-1-42 to 10-12-42 & that plf have to 10/8/42 to file brief. Not waived.
- Oct. 9—Fld plf's reply pts & auths with respect to second amended compl.
- “ 12—Ent proc on hrg various motions to dismiss, etc & ent ord that defts file memo by 10-15-42 & plf file ans memo by 10-23-42 & placed on cal of 10-26-42 at 10 a. m. for submission. . [399]
- 242—
- Oct. 15—Fld deft supp memo.
- ” 16—Ent Min Ord that plf file synopsis re Cert matters with pts & auths same to be fld with memo on 10/26/42 & that defts have to 11-2-42 to file ans memo & cont. to 11-9-42 at 10 A M for subm on various Mats to Dism.
- ” 23—Fld stip & ord thereon plfs pts & auth required by ord 10-16-42 be fld to & inc 11-2-42, defts to file answerg memo to & inc 11-9-42 and cause cont'd to 11-16-42 at 10 A M for submission.
- Nov. 2—Fld plfs arg & brief in reply to defts Auths on Mo's.
- ” 9—Fld pts & auths defts Elkus et al re Mats concerng 2nd Amend Compl. Fld pts & Auths L. M. Giannini, et al to plfs Arg & brief. Fld Ans of A. H. Giannini et al to plfs Arg & Brief in Reply

1942

to Defts points & Auth, etc. Fld Ansg
Memo to deft A. P. Giannini in sup of
his Mats directed at Second Amended
Compl.

Nov. 16—Ent Ord Stand submitted on Mats of
various defts to dismiss, etc.

1943

Feb. 1—Ent Ord Cont Term for Settg. N/A.

Apl. 16—Fld Memo of Conclus. Ent Min Ord
grantg all Mats to dismiss the Sec.
Amended Compl & allow Plf to 6/1/43 to
make application for leave to file 3rd
amended Compl., et. Notif Counsel

” 20—Fld not of Ord grtg mots to dismiss.

” 21—Fld 1 vol reprtrs trans hrg on mots
10/12/42

Fld 1 vol reprtrs trans hrg on mots
6/23, 24, 25/42.

Fld letter from Cosgrove & O’Neil with
photostat copy minutes Bd Dir Trans-
america Corp 12/9/31.

May 31—Fld Ord for hrg & design. officer to take
testi. in File No. 1-2964 before Sec. &
Exch Commr.

June 2—Fld petn B. F. McClung for leave to
intervene.

” 9—Ent Ord flg & ent Jdgmn. Fld & ent
Jdgmn of Dismsl with Costs to mov’g
defts. (OB 17/467. D & I Judgmt. Notif
counsel by mail. Made report JS 6

” 10—Fld not. of entry jdgmt.

1943

June 11—Fld cost bill deft Amadeo P. Giannini.

” 14—Taxed costs favor deft Giannini at \$30.00; Dock & ent. same. [400]

Sept. 7—Fld Plf's Notice of Appeal and Mailed Copies to Edmund Nelson, Atty for deft Transamerica Corp; Keyes & Erskine, Attys for A. H. Giannini et al; Russ Avery atty for L. M. Giannini et al; Tanner, Odell & Taft, Attys for Herbert E. White; Cosgrove & O'Neil, Attys for A. P. Giannini; Bacigalupi, Elkus & Salinger, Attys for Walston & Co. et al; Geo. D. Schilling & G. L. Berrey Attys for Bank of America; and Chas. B. & Jos. D. Taylor, Attys for interv. Bertha F. McClung.

Sept. 13—Fld smts pts on which appellant intends to rely.

Fld appellants desig contents rec on app

Sept. 20—Fld desig deft A. P. Giannini et al of addtl portions rec on app.

” 22—Fld supplemental desig of A. P. Giannini of addtl portions rec on app

Sept. 23—Fld appellees desig of addl parts rec on appl

Oct. 12—Fld ord extend'g time for flg & docketing trans of rec on app for period 45 days from & aft 10-17-43

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL

To the Defendants Named in the Above Entitled Actions As the Appellees Upon Appeal and Their Respective Attorneys of Record:

The plaintiff in the above entitled action and appellant upon appeal hereby makes the following statement of the points on which she intends to rely on the appeal, towit:

I.

The court's conclusion contained in its memorandum at pages 15 and 16 that:

“While the plaintiff charges that all of the defendants and said forty-four other persons committed fraudulent and illegal acts—recitals which are but legal conclusions—her [404] pleading fails to set forth with particularity the ultimate facts and circumstances constituting the alleged fraud and illegality.”

is erroneous.

II.

The court's conclusion, contained in its memorandum at page 28, that

“if the bar of the Statute of Limitations or of laches is to be avoided it will be necessary for plaintiff to plead other facts besides those set forth in her second amended complaint.”

is erroneous.

III.

The court's conclusion in referring to the plaintiff's second amended complaint contained in its memorandum at page 30 that

"It is replete with surplusage and repetitions as well as legal conclusions, including numerous recitals, more or less general, vague and indefinite * * *."

is erroneous.

IV.

The court's conclusion contained in its memorandum at page 35 that

"before it can be held that plaintiff has a cause or causes of action against defendants or any of them, and likewise before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint."

is erroneous. [405]

V.

The court's conclusion, contained in its memorandum page 37, that

"each and all of the respective motions to dismiss should be granted."

is erroneous.

VI.

The court's order, contained in the minute order of April 16, 1943, that

“each and all of the motions filed on behalf of the respective defendants to dismiss the second amended complaint be granted.”

is erroneous.

VII.

The court erred in making and giving the final judgment and decree dismissing plaintiff's cause of action which was filed and entered June 9th, 1943.

The above and foregoing points, Nos. 1-7 inclusive and the errors of the trial court mentioned and set forth in each of said points will be argued by appellant and submitted to the Circuit Court of Appeal for its consideration and decision.

VINCENT ANTHONY MARCO
HOMER N. BOARDMAN
PERCY V. CLIBBORN

Attorneys for Plaintiff and
Appellant.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Sept. 17, 1943. [406]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Defendants Named In the Above Entitled
Action As the Appellees Upon Appeal and
Their Respective Attorneys of Record:

The plaintiff in the above entitled action and the appellant upon the appeal hereby designates the following pleadings, motions, orders, judgments,

conclusions and other documents to be and constitute the record on appeal from the final judgment entered in the above action, to wit:

1. Minute order of June 25, 1942 on motions to dismiss first amended complaint and granting plaintiff sixty days in which to serve and file a second amended complaint.

2. Minute order of August 17, 1942 extending and enlarging the time for filing a second amended complaint to August 21, 1942, inclusive. [409]

3. The plaintiff's second amended complaint filed August 21, 1942.

4. File No. 1-2964, dated November 22, 1938, entitled "Order for Hearing and Designating Officer to take Testimony", made and given by the Federal Securities & Exchange Commission.

5. Motion to dismiss directed against the plaintiff's second amended complaint filed September 15, 1942 by Cosgrove & O'Neill on behalf of defendant Amadeo P. Giannini, individually and in certain representative capacities.

6. Motion to dismiss of defendant Herbert E. White, directed against plaintiff's second amended complaint and filed September 15, 1942 by his attorneys, Tanner, O'Dell & Taft.

7. Motion to dismiss directed against plaintiff's second amended complaint filed September 15, 1942 by Keys & Erskine, Herbert W. Erskine and Louis Ferrari for and on behalf of a certain group of defendants.

8. Motion to dismiss of defendant Bank of America National Trust & Savings Association di-

rected against plaintiff's second amended complaint and filed September 15, 1942 by it's attorneys George D. Schelling and G. L. Berrey.

9. Motion to dismiss directed against plaintiff's second amended complaint and filed September 15, 1942 by Bacigalupi, Elkus & Salinger and Claude N. Rosenberg, attorneys for and on behalf of a certain group of defendants.

10. Motion to dismiss directed against plaintiff's second amended complaint filed September 15, 1942 by Russ Avery as attorney for a certain group of defendants.

11. The answer of the defendant Transamerica corporation, a corporation, to the plaintiff's second amended complaint filed by its attorney of record, Edmund Nelson.

12. A minute order of April 16, 1943, granting all motions to dismiss and also granting plaintiff leave by June 1, [410] 1943 to make application for permission to file a third amended complaint.

13. The memorandum of the court's conclusions filed April 16, 1943.

14. The final judgment of dismissal filed June 9, 1943 and entered June 9, 1943 in Civil Order Book No. 17, Page 467 Records of the above entitled court.

15. Plaintiff's and appellant's notice of appeal to the Circuit Court of Appeals under Rule 73 (b).

16. Plaintiff's and appellant's designation of contents of record on appeal.

17. Plaintiff's and appellant's statement of the points on which she intends to rely on the appeal.

Plaintiff and appellant hereby requests that the above and foregoing portions of the record and proceedings in the above entitled case be constituted the record on appeal from the final judgment entered in the above entitled case and made into and prepared as a transcript for such purposes and in the manner provided by law.

VINCENT ANTHONY MARCO
HOMER N. BOARDMAN
PERCY V. CLIBBORN

Attorneys for plaintiff and appellant Rose Papan-
tonio, suing in her own behalf as a shareholder
of Transamerica corporation and in behalf of
all other shareholders of said corporation
similarly situated.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Sept. 13, 1943. [411]

[Title of District Court and Cause.]

DESIGNATION OF DEFENDANT AMADEO P.
GIANNINI OF ADDITIONAL PORTIONS
OF THE RECORD ON APPEAL

To the Clerk of the Above Entitled Court, And To
Plaintiff And Her Attorneys of Record:

Defendant and appellee, Amadeo P. Giannini, in-
dividually and in each of the capacities in which
he is sued, hereby designates the following addi-
tional portions of the record and proceedings to be
included in the record on plaintiff's appeal from the

final judgment entered in the above entitled action, to wit: [414]

(a) Transcript of Clerk's civil docket entries in this action.

(b) Plaintiff's first amended complaint, filed December 29, 1941.

(c) Motions by Defendant Amadeo P. Giannini, Individually and as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased: (1) To Dismiss the Action; (2) For an Order Requiring Plaintiff to Separately State Causes of Action in Separate Counts; (3) For a More Definite Statement or Bill of Particulars, and (4) to Strike, filed April 30, 1942.

(d) Motions by Defendant Herbert E. White (1) to Dismiss the Action; (2) For an Order Requiring Plaintiff to Separately State Causes of Action in Separate Counts; (3) For a More Definite Statement or Bill of Particulars, and (4) To Strike, filed April 30, 1942.

(e) Motions by Defendants A. H. Giannini, et al. (1) To Dismiss the Action; (2) For an Order Requiring Plaintiff to State Separately Causes of Action in Separate Counts; (3) For a More Definite Statement or Bill of Particulars; and (4) To Strike Out Portions of the Complaint, filed herein May 4, 1942.

(f) Motion of Defendant Bank of America National Trust & Savings Association, as Administrator-With-the-Will-Annexed, of the Estate of John M. Grant, Deceased, (1) To Dismiss the Action;

(2) For a More Definite Statement or Bill of Particulars, filed May 4, 1942.

(g) Notice of motions by defendants Walston & Co., a co-partnership, et al., filed herein May 4, 1942.

(h) Motions by Defendants L. M. Giannini, Individually and as an Alleged Partner of Walston & Co., et al., (1) to Dismiss the Action; (2) For an Order Requiring Plaintiff Separately to State Causes of Action in Separate Counts; (3) For a More Definite Statement or Bill of Particulars; and (4) To Strike, filed herein [415] May 4, 1942.

(i) The following excerpts from the Reporter's Transcript of June 23, 24 and 25, 1942, on the hearing of the motions described herein in paragraphs (c) to (h), inclusive, as follows, to wit:

(Insert asterisks following each excerpt to indicate matter is omitted.)

1. Page 5, line 1, the language: "Los Angeles, California, Tuesday, June 23, 1942; 10:00 A. M."

2. Page 47, lines 1 and 2, the language: "Afternoon Session 2:00 o'Clock".

3. Page 56, line 23, the words: "Mr. Cramer:"

4. Page 66, line 11, beginning with the words, "If the court please", through and including page 67, line 24, concluding with the words, "setting forth certain features."

5. Page 124, line 10, the words, "Mr. Ferrari:"

6. Page 129, line 21, beginning with the words, "We have also made", to and including page 132, line 24, concluding with the words "Gianninis at that time."

7. Page 238, line 1, the words: "Los Angeles, California, Thursday, June 25, 1942; 10:00 A. M."

8. Page 304, lines 1 and 2, the words: "Afternoon Session 2:00 o'Clock".

9. Page 318, line 1, beginning with the words, "The Court: The comments I am about to make", through and including page 338, line 16, concluding with the words, "Yes, if the court please". [416]

(j) Add to and include in each of the motions described in paragraphs 5 to 10, inclusive, of plaintiff's Designation of Contents of Record on Appeal the respective notices of motion attached to each motion.

(k) Add to the motion to dismiss described in paragraph 7 of plaintiff's Designation of Contents of Record on Appeal and immediately following the notice of said motion the Affidavit of Edmund Nelson and the Affidavit of Hector Campana, including Exhibit A thereto filed under the same cover.

(1) The following excerpts from the Reporter's Transcript of the hearing held October 12, 1942, on the motions of defendants directed at the second amended complaint, as follows, to wit:

(Insert asterisks following each excerpt to indicate matter is omitted.)

1. Page 4, line 1, the language: "Los Angeles, California, Monday, October 12, 1942; 9:30 A. M."

2. Page 5, line 17, beginning with the words, "The Court: Before it is determined", to and including page 6, line 11, concluding with the words "combined in a single cause of action".

3. Page 14, line 17, beginning with the words, "Now I observe", to and including page 15, line 13, concluding with the words "drafting of the second amended complaint".

4. Page 16, line 1, beginning with the words, "Mr. Boardman: May it please your Honor", to and including page 16, line 20, concluding with the words, "upon which it was done".

5. Page 32, line 20, the words, "Mr. Boardman:"

6. Page 33, line 19, beginning with the words, "Now, if your Honor thinks", to and including page 34, line 6, concluding with the words, "even think that [417] that was necessary".

7. Page 47, lines 1 and 2, the words, "Afternoon Session 1:00 o'Clock".

8. Page 54, line 3, beginning with the words, "The Court: I think it is unfortunate", to and including page 55, line 6, concluding with the words, "occur to me".

9. Page 96, line 19, beginning with the words, "Mr. Cosgrove: If your Honor please". continuing to and including page 98, line 9, concluding with the words "was sent to all the stockholders."

(m) Letter dated October 7, 1942, addressed to the Honorable Harry A. Hollzer, signed Cosgrove & O'Neil, By T. B. Cosgrove, including copy of minutes of the meeting of the Board of Directors of Transamerica Corporation held December 9, 1931, referred to and filed with said letter.

(n) Notice of order granting motions to dismiss, including affidavit of service thereof, filed

herein April 20, 1943, by Cosgrove & O'Neil, et al., attorneys for defendant Amadeo P. Giannini, individually and in all of the capacities in which he is sued.

(o) This Designation of Additional Portions of the Record on Appeal, including joinder of other defendants therein, together with affidavit of service thereof.

Defendant Amadeo P. Giannini, individually and in all capacities in which he is sued herein, hereby requests that the above and foregoing additional portions of the record and proceedings in the above entitled court be included in the record on appeal in the manner provided by Rule 75 of the [418] Federal Rules of Civil Procedure.

Dated: September 20, 1943.

COSGROVE & O'NEIL

T. B. COSGROVE

F. J. O'NEIL

JOHN N. CRAMER

By JOHN N. CRAMER

Attorneys for Defendant Amadeo P. Giannini, Individually and in All of the Capacities in Which He is Sued [419]

The defendants represented by the undersigned counsel hereby join in and adopt the within and foregoing Designation of Defendant Amadeo P.

Giannini of Additional Portions of the Record on Appeal.

TANNER, ODELL & TAFT

By DONALD A. ODELL

Attorneys for Defendant Herbert E. White

GEORGE D. SCHILLING and

G. L. BERREY

By G. L. BERREY

Attorneys for Defendant Bank of America National
Trust & Savings Association as Administrator-
With-the-Will-Annexed of the Estate of John
M. Grant, Deceased

BACIGALUPI, ELKUS &

SALINGER

CLAUDE N. ROSENBERG,

ESQ.

By CLAUDE N. ROSENBERG

Attorneys for Defendants Walston & So., a copart-
nership, and Charles deY. Elkus, William S.
Hoelscher, Clifford P. Hoffman, C. J. Smith,
Vernon C. Walston and Claire Giannini Hoff-
man, transacting business as copartners under
the firm name and style of Walston & Co.

RUSS AVERY and GORDON

GRAY

By RUSS AVERY

Attorneys for Defendants L. M. Giannini, indi-
vidually, and as an alleged partner of Walston
& C., O. D. Hamlin, T. W. Harris, A. P. Ja-
cobs, F. G. Stevenot, P. A. Bricca, George J.
DeMartini, W. N. Lagomarsino, Chester H.

Loveland, Theodore M. Stuart, A. J. Scampini,
Gordon Gray and Russ Avery.

KEYES & ERSKINE

HERBERT W. ERSKINE

LOUIS FERRARI

By HERBERT W. ERSKINE

Attorneys for Defendants A. H. Giannini, William
E. Blauer, Leon Bocqueraz, E. H. Clark,
Charles N. Hawkins, W. F. Morrish, A. J.
Mount, Alfred E. Sbarboro, James A. Baci-
galupi, George A. Webster, C. R. Bell, W. W.
Garthwaite and Louis Ferrari, jointly and
severally.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Sept. 20, 1943.

[420]

[Title of District Court and Cause]

S U P P L E M E N T A L D E S I G N A T I O N O F
A M A D E O P . G I A N N I N I O F A D D I T I O N A L
P O R T I O N S O F T H E R E C O R D O N A P -
P E A L

To the Clerk of the Above Entitled Court, and to
Plaintiff and Her Attorneys of Record:

Defendant and appellee, Amadeo P. Giannini,
individually and in each of the capacities in which
he is sued, hereby supplements the "Designation of
Defendant Amadeo P. Giannini of Additional Por-
tions of the Record on Appeal" filed herein Septem-
ber 20, 1943, by designating further additional por-

tions of the record and proceedings to be included in the record on plaintiff's appeal from the final judgment entered in the above entitled action, to wit: [422]

(p) The complaint herein filed on or about April 16, 1941.

(q) The following additional excerpts from the Reporters' Transcript of the hearing held October 12, 1942, on the motions of defendants directed at the second amended complaint, as follows, to wit:

(Insert asterisks following each excerpt to indicate matter is omitted)

1. Page 19, line 14, the words, "Mr. Boardman:"
2. Page 21, line 4, beginning, "* * * I want to say to the court", to and including page 21, line 10, concluding with the words, "that record."

(r) This Supplemental Designation of additional portions of the record on appeal, including the joinder of certain other defendants therein, together with affidavit of service thereof.

Defendant Amadeo P. Giannini, individually and in all capacities in which he is sued herein, hereby requests that the above and foregoing further additional portions of the record and proceedings in the above entitled court be included in the record on appeal in the manner provided by Rule 75 of the Federal Rules of Civil Procedure, in addition to the matters indicated in the Designation of Defendant Amadeo P. Giannini of Additional Portions of the Record on Appeal filed herein September 20, 1943.

Dated: September 22, 1943.

COSGROVE & O'NEIL,

T. B. COSGROVE,

F. J. O'NEIL,

JOHN N. CRAMER,

By JOHN N. CRAMER,

Attorneys for Defendant Amadeo P. Giannini, Individually and in All of the Capacities in Which He is Sued. [423]

The defendants represented by the undersigned counsel hereby join in and adopt the within and foregoing Supplemental Designation of Amadeo P. Giannini of Additional Portions of the Record on Appeal.

TANNER, ODELL & TAFT,

By DONALD A. ODELL,

Attorneys for Defendant Herbert E. White.

GEORGE D. SCHILLING and

G. L. BERREY,

By G. L. BERREY,

Attorneys for Defendant Bank of America National Trust & Savings Association as Administrator-With-the-Will-Annexed of the Estate of John M. Grant, Deceased.

RUSS AVERY and
GORDON GRAY,

By RUSS AVERY,

Attorneys for Defendants L. M. Giannini, individually, and as an alleged partner of Walston & Co., O. D. Hamlin, T. W. Harris, A. P. Jacobs, F. G. Stevenot, P. A. Bricca, George J. DeMartini, W. N. Lagomarsino, Chester H. Loveland, Theodore M. Stuart, A. J. Scampini, Gordon Gray and Russ Avery.

(Affidavit of Services by Mail Attached.)

[Endorsed]: Filed Sept. 22, 1943. [424]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court, and to
Plaintiff and Her Attorneys of Record:

Defendants and Appellees, Charles de Y. Elkus, and Charles de Y. Elkus, William S. Hoelscher, Clifford P. Hoffman, C. J. Smith, Vernon C. Walston and Clair Giannini Hoffman, transacting business as co-partners under the firm name and style of Walston & Co., and Walston & Co., a co-partnership, jointly and severally, hereby designate the following additional matters to be included in the record on Plaintiff's appeal from the final judgment entered in the above entitled action, to-wit:

1. Plaintiff's complaint filed herein at the time the [426] above entitled cause was instituted so that the record on appeal will include said original complaint, Plaintiff's first amended complaint and plaintiff's second amended complaint, the latter two of which pleadings have heretofore been designated to be contained in said record on appeal.

2. The following statement made by Plaintiff's counsel upon oral argument of motions heard on October 12th, 1942, which statement appears at Page 21, lines 4 to 10 of the Reporter's Transcript thereof, to-wit:

“* * * I want to say to the court and to opposing counsel that the facts that are alleged in the present complaint and the theory of the case is based, or are based, upon the proceedings, the official proceedings before the Securities and Exchange Commission, and if it is necessary we will ask the court to take judicial notice of that record.”

3. This designation of additional portions of the record on appeal including affidavit of service thereof.

The Defendants and Appellees hereinabove named, and on whose behalf this designation is made, do hereby request that the above and foregoing additional portions of the record and proceedings in the above entitled court be included in the record on appeal in the manner provided by Rule 75 of the Federal Rules of Civil Procedure.

Dated: September 22, 1943.

BACIGALUPI, ELKUS & SAL-
INGER,

CLAUDE N. ROSENBERG,

By CLAUDE N. ROSENBERG,

Attorneys for defendants, Charles de Y. Elkus, and
Charles de Y. Elkus, William S. Hoelscher,
Clifford P. Hoffman, C. J. Smith, Vernon C.
Walston and Clair Giannini Hoffman, transact-
ing business as co-partners under the firm name
and style of Walston & Co., and Walston & Co.,
a co-partnership, jointly and severally. [427]

The Defendants and Appellees represented by the
undersigned counsel hereby join in and adopt the
within and foregoing "Designation of Additional
Portions of Record on Appeal".

KEYES & ERSKINE,

HERBERT W. ERSKINE,

LOUIS FERRARI,

By LOUIS FERRARI,

Attorneys for Defendants A. H. Giannini, William
E. Blauer, Leon Bocqueraz, E. H. Clark,
Charles N. Hawkins, W. F. Morrish, A. J.
Mount, Alfred E. Sbarboro, James A. Baciga-
lupi, George A. Webster, C. R. Bell, W. W.
Garthwaite and Louis Ferrari, jointly and sev-
erally.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Sept. 23, 1943. [428]

[Title of District Court and Cause]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING TRANSCRIPT OF
RECORD ON APPEAL

Upon application of the appellant and for good cause duly shown, the time for filing and docketing the transcript of the record on appeal in the above entitled action is hereby extended for a period of forty-five days from and after October 17th, 1943.

Dated this 12 day of October, 1943.

H. A. HOLLZER,

Judge. [430]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 430 inclusive contain full, true and correct copies of: Complaint; First Amended Complaint; Motions by Defendant Amadeo P. Giannini, individually and as executor of the last will and testament of Virgil D. Giannini, deceased, to Dismiss the Action; for an Order Requiring Plaintiff to Separately State Causes of Action in Separate Counts; for a more Definite Statement or Bill of Particulars and to Strike; Motions by Defendant Herbert E. White to Dismiss the Action; for an Order Requiring Plaintiff to Separately

State Causes of Action in Separate Counts; for a More Definite Statement or Bill of Particulars, and to Strike; Notice of Motions by Defendants Walston & Co., a copartnership and Charles de Y. Elkus, William S. Hoelscher, Clifford P. Hoffman, C. J. Smith, Vernon C. Walston and Claire Giannini Hoffman transacting business as copartners under the firm name and style of Walston & Co.; Motions by Defendants L. M. Giannini, individually, and as an alleged partner of Walston & Co., O. D. Hamlin, T. W. Harris, A. P. Jacobs, F. G. Stevenot, P. A. Bricca, George J. De Martini, W. N. Lagomarsino, Chester H. Loveland, Theodore M. Stuart, A. J. Scampini, Gordon Gray and Russ Avery to Dismiss the Action; for an Order Requiring Plaintiff Separately to State Causes of Action in Separate Counts; for a More Definite Statement or Bill of Particulars and to Strike; Motions by Defendants A. H. Giannini, William E. Blauer, Leon Bocqueraz, E. H. Clark, Charles N. Hawkins, W. F. Morrish (sued herein as W. F. Morrison), A. J. Mount, Alfred E. Sbarboro (sued as Alfred E. Sparboro), James A. Bacigalupi, George A. Webster, C. R. Bell, W. W. Garthwaite and Louis Ferrari, jointly and severally, to Dismiss the Action; for an Order Requiring Plaintiff to State Separately causes of Action in Separate Counts; for a More Definite Statement or Bill of Particulars, and To Strike Out Portions of the Complaint; Motion by Defendant Bank of America National Trust & Savings Association, as Administrator-with-the-will-annexed of the Estate of John M. Grant, Deceased, to Dismiss

the Action; for a More Definite Statement or Bill of Particulars; Minute Orders Entered June 25, 1942 and August 17, 1942 respectively; Second Amended Complaint; Motions by Defendants L. M. Giannini, individually and as an Alleged Partner of Walston & Co., Gordon Gray, O. D. Hamlin, T. W. Harris, A. P. Jacobs, F. G. Stevenot, Russ Avery, P. A. Bricca, George J. De Martini, W. N. Lagomarsino, A. J. Scampini, Chester H. Loveland and Theodore M. Stuart, to Dismiss the Action; for an Order Requiring Plaintiff Separately to State Causes of Action in Separate Counts; for a more Definite Statement or Bill of Particulars; and to Strike out the Entire Second Amended Complaint; and to Strike Out Designated Portions of the Second Amended Complaint; Motion of Defendant Bank of America National Trust & Savings Association, as Administrator-with-the-will-annexed of the Estate of John M. Grant, deceased, to Dismiss the Action; to Require Plaintiff to State Separately her several Causes of Action and for a More Definite Statement or Bill of Particulars; Motions by Defendants A. H. Giannini, William E. Blauer, Leon Bocqueraz, E. H. Clark, Charles N. Hawkins, W. F. Morrish, A. J. Mount, Alfred E. Sbarboro, James A. Bacigalupi, George A. Webster, C. R. Bell, W. W. Garthwaite and Louis Ferrari, jointly and severally, to Dismiss the Action; to Separately State the Several Causes of Action in Separate Counts, Said Motion being without Prejudice to Motions to Dismiss and to Strike, based on same ground; for a More Definite Statement and Bill of Particulars;

to Strike Out the Entire Second Amended Complaint and to Strike Out Designated Portions of the Second Amended Complaint; Motions by Defendants Charles de Y. Elkus, and Charles de Y. Elkus, William S. Hoelscher, Clifford P. Hoffman, C. J. Smith, Vernon C. Walston and Claire Giannini Hoffman, transacting business as copartners under the firm name and style of Walston & Co., and Walston & Co., a copartnership, jointly and severally to Dismiss the Action; for Statement in Separate Counts of Various Alleged Causes of Action; for a more Definite Statement and Bill of Particulars; Motions by Defendant Herbert E. White to Dismiss the Action; to Separately State the Several Causes of Action in Separate Counts, said motion being without prejudice to motions to dismiss and to strike; for a More Definite Statement and Bill of Particulars; to Strike out the Entire Second Amended Complaint and to Strike Out Certain Designated Portions of the Second Amended Complaint; Answer of Defendant Transamerica Corporation; Minute Order Entered April 16, 1943; Memorandum of Conclusions; Notice of Order Granting Motions to Dismiss; Letter dated October 27, 1942 to Hon. Harry A. Hollzer with minutes of Board of Directors of Transamerica Corporation attached; Order for Hearing and Designating Officer to take Testimony; Judgment of Dismissal; Notice of Appeal; Portions of Reporter's Transcript of Proceedings on Hearings Designated by Appellees; Clerk's Docket Entries; Bond for Costs on Appeal; Statement of Points upon which Ap-

pellant intends to Rely on the Appeal; Designation of Contents of Record on Appeal; Designation of Defendant Amadeo P. Giannini, of Additional Portions of the Record on Appeal; Supplemental Designation of Amadeo P. Giannini of Additional Portions of the Record on Appeal; Designation of Additional Portions of Record on Appeal and Order Extending Time for Filing and Docketing Transcript of Record on Appeal which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$101.55 which sum has been paid to me by Appellant.

Witness my hand and the seal of said District Court this 29th day of November, 1943.

[Seal]

EDMUND L. SMITH,

Clerk,

By THEODORE HOCKE,

Deputy Clerk.

[Endorsed]: No. 10625. United States Circuit Court of Appeals for the Ninth Circuit. Rose Papantonio, suing in her own behalf as a shareholder of Transamerica Corporation and in behalf of all other shareholders of said corporation similarly situated, Appellant, vs. Amadeo P. Giannini, L. M. Giannini, A. H. Giannini, Amadeo P. Giannini (as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased), Bank of America National Trust & Savings Association, a national banking association (as Administrator-With-The Will-Annexed of the Estate of John M. Grant, Deceased), Gordon Gray, O. D. Hamlin, T. W. Harris, A. P. Jacobs, F. C. Stevenot, Russ Avery, P. A. Bricca, George J. De Martini, W. N. Lagomarsino, A. J. Scampini, William E. Blauer, Leon Bocqueraz, E. H. Clark, Charles N. Hawkins, W. F. Morrish, A. J. Mount, Alfred E. Sbarboro, Chester H. Loveland, P. C. Hale, James A. Bacigalupi, Armando Pedrini, George A. Webster, E. J. Nolan, C. R. Bell, W. W. Garthwaite, George N. Armsby, Louis Ferrari, V. Scialoja, Theodore M. Stuart, Herbert E. White, Charles de Y. Elkus, William S. Hoelscher, Clifford P. Hoffman, C. J. Smith, Vernon C. Walston, Amadeo P. Giannini, L. M. Giannini and Claire Giannini Hoffman, transacting business as co-partners under the firm name and style of Walston & Co., and Amadeo P. Giannini (as the Executor of the Last Will and Testament of Virgil D. Giannini, a deceased member of said co-partnership), Walston & Co., a co-partnership and Transamerica Corporation, a corporation, Appellees.

Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed: November 30, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10625

ROSE PAPANTONIO, suing on behalf of herself
and all other stockholders of Transamerica Cor-
poration, similarly situated, who may join in
the action and contribute to the expense thereof,
Appellant,

vs.

AMADEO P. GIANNINI, et al.,

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT RELIES ON APPEAL AND
DESIGNATION OF PARTS OF THE REC-
ORD NECESSARY FOR THE CONSID-
ERATION THEREOF

To the Clerk of the Aforesaid Court, the Appellees
Named in This Action and Their Respective
Attorneys of Record:

Pursuant to Sub-division 6 of Rule 19 of the

above court, the appellant for her statement of the points upon which she intends to rely on the appeal and for her designation of the parts of the record which she thinks necessary for the consideration thereof, states as follows:

I.

For appellant's statement of points upon which she intends to rely on the appeal appellant hereby refers to her "Statement of Points" filed in the District Court of the United States, Southern District of California, Central Division in Cause No. 1490-H under Rule 75 (d) R.C.P. and hereby adopts the same as her "Statement of Points" required by said Sub-division 6 of Rule 19 of the above court.

II.

For appellant's "Designation of the Parts of the Record Which She Thinks Necessary for the Consideration of the Above Mentioned Points", appellant hereby refers to her "Designation of Contents of Record on Appeal" filed in the District Court of the United States, Southern District of California, Central Division in Cause No. 1490-H, under Rule 75 (a) R. C. P. and hereby adopts the same as her "Designation of the Parts of the Record Which She Thinks Necessary for the Consideration of the Above Mentioned Points" also required by Sub-division 6 of Rule 19 of the above court.

Appellant hereby requests that the above and foregoing statement of points and designation of parts of the typewritten transcript of the record constitute the "Printed Record on Appeal" from

the final judgment entered in the above entitled case by the District Court of the United States, Southern District of California, Central Division in said Cause No. 1490-H.

VINCENT ANTHONY MARCO,
HOMER N. BOARDMAN,
PERCY V. CLIBBORN,
Attorneys for Appellant.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed Dec. 10, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF PARTS OF
THE CERTIFIED TYPEWRITTEN REC-
ORD WHICH THEY THINK MATERIAL
AND WHICH THEY DESIRE TO HAVE
CONTAINED IN THE PRINTED RECORD

To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:
Honorable Paul P. O'Brien, Clerk of the Above
Entitled Court: Plaintiff and Appellant Herein
and Her Attorneys of Record:

In accordance with Rule 19, paragraph 6, of the Rules of this court, defendants and appellees state that they think that the parts of the certified type-written record hereinafter more particularly described are material and should be contained in the printed record herein, and they pray that the same be included in such printed record. The additional

parts of the certified typewritten record above referred to are more particularly described as follows:

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| Letter dated October 27, 1942, to Honorable Harry A. Hollzer, with minutes of meeting of Board of Directors of Transamerica Corporation attached, filed April 21, 1943 | 313 |
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| Dated this 10th day of December, 1943. | |
| T. B. COSGROVE, | |
| F. J. O'NEIL, | |
| JOHN N. CRAMER, | |
| By JOHN N. CRAMER, | |
| Attorneys for Appellee, Amadeo P. Giannini, Individually and as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased. | |

GEORGE D. SCHILLING and
G. L. BERREY,

By G. L. BERREY,

Attorney for Appellee, Bank of America National
Trust & Savings Association, as Administrator-
with-the-will-annexed of the Estate of John M.
Grant, Deceased.

RUSS AVERY and
GORDON GRAY,

By RUSS AVERY,

Attorneys for Appellees, L. M.
Giannini, et al.,

ROBERT A. ODELL,

Attorney for Appellee, Her-
bert E. White.

LOUIS FERRARI,

HERBERT W. ERSKINE,

Attorneys for Appellees, A. H.
Giannini, et al.

BACIGALUPI, ELKUS &
SALINGER,

CLAUDE W. ROSENBERG,

Attorneys for Appellees,
Walston & Co., et al.

[Endorsed]: Filed Dec. 14, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION REGARDING PRINTING OF
RECORD ON APPEAL

The appellant in above action has filed herein a motion that there be omitted from the printed record on appeal certain of the papers and records designated by the appellees to be included thereon.

It Is Stipulated and Agreed Between the Parties that all the papers and records so designated by the appellees as well as those designated by the appellant shall be included as part of the said printed record; that the appellant shall deposit in said Court the estimated cost of printing the said record; and that the appellees will deposit a like amount; said deposits to abide the order of this Court;

Provided, however, that it is also stipulated and agreed between the parties hereto as follows:

1. The foregoing agreement will be without prejudice to the appellees' contention that all of the said papers and records are properly a part of the said record on appeal and therefore should be printed as a part of it.

2. The said agreement is without prejudice to appellees' contention that in any event the appellees, in the event said appeal is decided in their favor, can be held liable only for the cost of printing such portion, if any, of the record on appeal, as the Court may determine was unnecessarily printed in the said record.

3. Said agreement shall be without prejudice to the contention of appellant that all the papers and

documents referred to in her said motion are unnecessary, and therefore should not be printed as a part of said record.

It Is Stipulated and Agreed that upon said record on appeal being printed the clerk of the above court shall defray the expense thereof from the funds deposited by appellant and appellees pursuant to the foregoing, and shall hold an equal amount on deposit until the Court finally determines and taxes the cost of printing said record. Should the printing cost be less than the estimated cost thereof appellant and appellee, respectively, shall have refunded to them by said Clerk upon completion of such printing an amount equal to the difference between the estimated and actual cost of printing.

Dated at San Francisco, California, February 7, 1944.

VINCENT ANTHONY MARCO

Of counsel for appellant.

CLAUDE W. ROSENBERG,

MORSE ERSKINE,

Of counsel for appellees.

[Endorsed]: Filed Feb. 7, 1944. Paul P. O'Brien, Clerk.

No. 10625.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of
TRANSAMERICA CORPORATION and in behalf of all other share-
holders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI,
AMADEO P. GIANNINI (as Executor of the Last Will and Testa-
ment of Virgil D. Giannini, Deceased), BANK OF AMERICA
NATIONAL TRUST & SAVINGS ASSOCIATION, a national
banking association (as Administrator-with-the-Will-Annexed of the
Estate of John M. Grant, Deceased), GORDON GRAY, O. D. HAM-
LIN, T. W. HARRIS, A. P. JACOBS, F. C. STEVENOT, RUSS
AVERY, P. A. BRICCA, GEORGE J. DE MARTINI, W. N. LAGO-
MARSINO, A. J. SCAMPINI, WILLIAM E. BLAUER, LEON
BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F.
MORRISH, A. J. MOUNT, ALFRED E. SBARBORO, CHESTER
H. LOVELAND, P. C. HALE, JAMES A. BACIGALUPI, ARM-
ANDO PEDRINI, GEORGE A. WEBSTER, E. J. NOLAN, C. R.
BELL, W. W. GARTHWAITE, GEORGE N. ARMSBY, LOUIS
FERRARI, V. SCIALOJA, THEODORE M. STUART, HERBERT
E. WHITE, CHARLES DE Y. ELKUS, WILLIAM S. HOEL-
SCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C.
WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI and
CLAIRE GIANNINI HOFFMAN, transacting business as co-partners
under the firm name and style of WALSTON & CO., and AMADEO
P. GIANNINI (as the Executor of the Last Will and Testament of
Virgil D. Giannini, a deceased member of said co-partnership),
WALSTON & CO., a co-partnership and TRANSAMERICA COR-
PORATION, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

VINCENT ANTHONY MARCO,

HOMER N. BOARDMAN,

PERCY V. CLIBBORN,

9720 Sunset Boulevard, Beverly Hills, California,

Attorneys for Appellant.

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No. 10625.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of
TRANSAMERICA CORPORATION and in behalf of all other share-
holders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI,
AMADEO P. GIANNINI (as Executor of the Last Will and Testa-
ment of Virgil D. Giannini, Deceased), BANK OF AMERICA
NATIONAL TRUST & SAVINGS ASSOCIATION, a national
banking association (as Administrator-with-the-Will-Annexed of the
Estate of John M. Grant, Deceased), GORDON GRAY, O. D. HAM-
LIN, T. W. HARRIS, A. P. JACOBS, F. C. STEVENOT, RUSS
AVERY, P. A. BRICCA, GEORGE J. DE MARTINI, W. N. LAGO-
MARSINO, A. J. SCAMPINI, WILLIAM E. BLAUER, LEON
BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F.
MORRISH, A. J. MOUNT, ALFRED E. SBARBORO, CHESTER
H. LOVELAND, P. C. HALE, JAMES A. BACIGALUPI, ARM-
ANDO PEDRINI, GEORGE A. WEBSTER, E. J. NOLAN, C. R.
BELL, W. W. GARTHWAITE, GEORGE N. ARMSBY, LOUIS
FERRARI, V. SCIALOJA, THEODORE M. STUART, HERBERT
E. WHITE, CHARLES DE Y. ELKUS, WILLIAM S. HOEL-
SCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C.
WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI and
CLAIRE GIANNINI HOFFMAN, transacting business as co-partners
under the firm name and style of WALSTON & CO., and AMADEO
P. GIANNINI (as the Executor of the Last Will and Testament of
Virgil D. Giannini, a deceased member of said co-partnership),
WALSTON & CO., a co-partnership and TRANSAMERICA COR-
PORATION, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

Prefatory Statement.

This is an appeal from a judgment of dismissal, made
and given by the United States District Court for the
Southern District of California, Central Division, entered
and docketed on June 9th, 1943, pursuant to an order

granting the defendants' several motions to dismiss plaintiff's second amended complaint. [Tr. 448, 449, 450, 451.]

The plaintiff is a shareholder of the defendant "Transamerica Corporation" and the defendants were, at the various times mentioned in said complaint, its directors and principal officers.

The plaintiff by her action, on behalf of herself and other shareholders, seeks to have a trust relationship judicially established wherein the defendants are trustees and the defendant "Transamerica Corporation" and its shareholders are beneficiaries; that the defendants as such trustees be required to account for certain secret profits acquired and corporate losses occasioned by their wrongful acts, and judgment against them, for the use and benefit of the defendant "Transamerica Corporation," for the balance found due by such accounting, together with costs and counsel fees. [Tr. 188, 189.]

The action was filed April 16, 1941. [Tr. 24.]

Jurisdictional Statement.

The District Court.

The jurisdiction of the District Court of the Southern District, Central Division of California, is sustained by Section 24 (1) (B) of the Judicial Code as amended (28 U. S. C. A. 41).

The jurisdiction of said District Court is further sustained by Section 52 of the Judicial Code (28 U. S. C. A. 113).

The pleadings necessary to show, and which establish, the existence of the jurisdiction of said District Court are as follows:

The plaintiff's second amended complaint, Paragraphs V and VI [Tr. 146], Paragraph VIII [Tr. 147], Paragraph X [Tr. 148], Paragraph XIII [Tr. 149], Paragraph XIV [Tr. 149], and Paragraph XVII [Tr. 150].

The Circuit Court of Appeals.

The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Section 128 (a) (d) of the Judicial Code as amended (28 U. S. C. A. 225) (a) (d). The jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, of this appeal, is further sustained by plaintiff's compliance with Rule 73 of the Federal Rules of Civil Procedure.

The proceedings and documents which sustain the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, of this appeal, are as follows:

1. The final judgment of dismissal of the plaintiff's action, from which this appeal is taken, which was entered and docketed on June 9, 1943. [Tr. 448, 449, 450 and 451.]

2. Plaintiff's "notice of appeal," provided by subdivision (a) and (b) of Rule 73 of the Federal Rules of Civil Procedure, filed September 7, 1943. [Tr. 451, 452.]

3. Plaintiff's "Designation of contents of record on appeal" filed with the District Court on September 13, 1943, pursuant to subdivision (a), Rule 75 of the Federal Rules of Civil Procedure. [Tr. 494, 495, 496, 497.]

4. Plaintiff's "Points upon which she intends to rely on the appeal" filed September 17, 1943, pursuant to subdivision (d) of Rule 75 of the Federal Rules of Civil Procedure. [Tr. 492, 493, 494.]

Statement of the Case.

The admitted facts in this case are set forth in plaintiff's second amended complaint [Tr. 143 to 192], which we summarize as follows:

Note:

(1) The defendant "Transamerica Corporation" with its corporate subsidiaries, departments and instrumentalities will for convenience hereinafter be mentioned as the "defendant corporation."

(2) The conspiring individual defendants and other persons will be mentioned in this statement as the "conspirators."

The Parties.

The plaintiff was a shareholder of the "defendant corporation" at the time of each and all of the transactions of which she complains. [Tr. Para. XVIII, p. 150.]

The individual defendants with the exception of Vernon C. Walston, William S. Hoelscher, C. J. Smith, Clifford P. Hoffman, Claire Giannini Hoffman and Virgil D. Giannini (now deceased), at the times mentioned in the complaint, and between October 11, 1928 and August 17, 1942, were the directors and principal officers of the "defendant corporation." [Tr. Para. XXII, pp. 157, 158, 159.]

Certain other persons, not named as defendants, who conspired with the defendants and participated in their wrongful acts were, at the times mentioned in said complaint, and between January 8, 1929 and August 17, 1942, also directors of the "defendant corporation." [Tr. Para. XXIII, pp. 160, 161.]

The defendant Walston & Co., a co-partnership, mentioned and described in Paragraphs VII and VIII of the complaint [Tr. 147], was one of the agencies used by the individual defendants in committing certain of the wrongful acts to effect the object of the conspiracy. [Tr. Paras. XXX, XXXI, XXXII, XXXIII, pp. 169, 170, 171, 172, 173.]

The individual defendants, who were not directors nor officers of the "defendant corporation," to-wit, Vernon C. Walston, William S. Hoelscher, C. J. Smith, Clifford P. Hoffman, Claire Giannini Hoffman and Virgil D. Giannini (now deceased), together with the defendants Charles De Y. Elkus, Amadeo P. Giannini and L. M. Giannini, who were directors and officers of "defendant corporation," constitute the individual members of said defendant co-partnership Walston & Co. [Tr. Para. VII, p. 147.]

The defendant Bank of America National Trust & Savings Association is and has been since on or about March 25, 1941, the administrator with the will annexed of the estate of John M. Grant (now deceased), who was one of the participants in the conspiracy and the wrongful acts pursuant thereto as set forth in the complaint. [Tr. Para. XII, p. 148; Para. XIX, p. 150.]

The defendant Amadeo P. Giannini, is and has been since on or about the 28th day of April, 1938, the executor of the last will and testament of Virgil D. Giannini (now deceased), who was also one of the persons who participated in the conspiracy and the wrongful acts pursuant thereto as set forth in the complaint. [Tr. Para. XI, p. 148; Para. XIX, p. 150.]

The "defendant corporation," for whose benefit this action is maintained, has been since on or about October

11, 1928, and still is a *Delaware corporation* transacting business within the state of California, with its principal place of business and office in said state in the City and County of San Francisco and engaged in conducting numerous business enterprises by and through other corporations and associations as its corporate subsidiaries, departments and instrumentalities. [Tr. Paras. I and II, pp. 144 and 145.]

The Conspiracy.

On or about the 11th day of October, 1928, the “conspirators” entered into a “conspiracy agreement” to control, operate and use the “defendant corporation” for their private, personal and individual gain and to the detriment of the corporation and its shareholders, and, for such purpose to misappropriate its corporate funds, assets and property and use the same together with their official positions and the confidential and special knowledge gained thereby, for their private and individual secret profit.

As part of the conspiracy the “conspirators” also agreed by and between themselves as follows:

(a) They should, at all times, obtain and maintain control of the issued and outstanding voting shares of the capital stock of “defendant corporation,” and by virtue thereof, elect, maintain control of, and dominate all of the individual members of all its Boards of Directors, and all its principal officers and also control, dominate, dictate, determine and direct all its business affairs and policies.

(b) A majority of or all the individual members of all Boards of Directors and a majority or all of the principal officers of “defendant corporation” should at all times be

elected and maintained from the membership of said conspiracy; and in the event any individual member of such Boards of Directors should not become a member of said conspiracy that he should at all times be completely dominated by the conspirators to the extent that each non-conspiring member should be a puppet or dummy for and the *alter ego* of said “conspirators” and, in the performance of his official duty and all his corporate acts, respond completely to the will and desire of said conspirators, and exercise no independent judgment nor discretion concerning the same.

(c) By and through such Boards of Directors the “defendant corporation” should be caused to apply and use its funds, property and facilities to organize, acquire, finance and maintain, various private, personal and individual business enterprises to be owned and conducted by and for the personal and private interest and secret profit of the conspirators or some of them.

(d) By and through such Boards of Directors the “defendant corporation” should be caused to assume or enter into fraudulent and pretended contracts, purporting to evidence valid transactions with, and legal rights of, the conspirators, or some of them, to be used as subterfuges, and to give color of right to transactions whereby large and substantial sums of money belonging to the “defendant corporation” be withdrawn and converted, by said conspirators, or some of them, to their private secret use and profit.

(e) The “conspirators” should, by the use of their official positions with the defendant corporation, and the confidential and special knowledge gained thereby, manipulate

the capital stock of "defendant corporation" upon various national securities exchanges, engage in secret and private speculations therein, and the acquirement of secret and private profit thereby, and to effect such objects, such boards of directors should cause the "defendant corporation" to apply and use its funds and property to finance all such manipulations and speculations, pay all expenses thereof, and the losses sustained thereby.

(f) By and through such boards of directors, the investment, security brokerage and other businesses of said "defendant corporation" should be diverted and transferred to other corporations, associations and co-partnerships which should be secretly organized, acquired, owned and operated by the "conspirators," or some of them, for their individual use and private secret profit.

(g) In order to give the corporate acts, to be performed in the execution of the conspiracy, the appearance of ordinary routine business and not transactions of such importance as to require the careful consideration of all of the members of the board of directors, and that said transactions should not have the appearance of being the result of a carefully planned scheme, some of the directors of the "defendant corporation" should propose and affirmatively present the authorization of such acts, and as long as a quorum of the Board was present, others of said conspiring directors, should passively acquiesce therein by remaining absent from the meetings when and where such corporate acts were to be authorized.

(h) Each and all of the corporate acts deemed necessary by the conspirators, to effect the common design of the conspiracy, should, at all times, be covered, disguised and concealed from all shareholders and directors of de-

defendant Transamerica Corporation other than the conspirators, and to effect such concealment, such acts should fail to truthfully appear upon, or be reflected by, the corporate records and books of account of "defendant corporation," but on the other hand, should be entirely withheld therefrom, or included therein under, and camouflaged by, false, fictitious, untrue, and misleading names, designations, and accounts, wherein and whereby the private, and secret interests of the conspirators therein, should be completely concealed.

(i) In the event the conspirators, for any particular year, or other period of time, should fail to maintain a control of the voting shares of the capital stock of the "defendant corporation," and the election and maintenance of its directors, then, nevertheless, the conspiracy should not terminate, but thereafter the conspirators should attempt to regain control of such stock of the "defendant corporation," and if successful in so doing, then said conspiracy and the common design thereof should continue to exist, be effective as originally agreed, and should continue indefinitely until completely and successfully terminated. [Tr. Para. XIX, pp. 150-156.]

The Wrongful and Overt Acts.

For the purpose of effecting the conspiracy and accomplishing its common design the conspirators committed and performed the following acts and engaged in the following transactions and series of transactions, each of which was committed and performed for their own private and individual benefit with *intent* to enhance their personal and individual interests and unjustly enrich themselves, or

some of them from secret profits and private gain to the detriment of the "defendant corporation" and its shareholders. [Tr. Para. XX, p. 156 and Paras. XXVI, p. 163; XXVII, p. 166; XXVIII, p. 168; XXX, p. 170; XXXI, p. 171; XXXII, p. 172; XXXV, p. 175; XXXVI, p. 177; XXXVII, p. 179 and XXXIX, p. 182 (losses).]

1. Commencing October 11, 1928, and to and including August 21, 1942, the date upon which the plaintiff's second amended complaint was filed, the "conspirators," during all such times, procured, held, and exercised complete control of all of the issued and outstanding voting shares of capital stock of "defendant corporation," and by such control named and elected all the individual members of its Boards of Directors and completely controlled, and directed its entire business policies and affairs. [Tr. Para. XXI, pp. 156, 157.]

2. By and through the control of said stock, each of the individual defendants was from time to time elected a member of "defendant corporation's" board of directors, accepted and assumed the corporate duties and liabilities thereof, and served and acted as such director for certain periods of time between October 11, 1928 and August 21, 1942. [Tr. Para. XXII, pp. 157, 158, 159.]

3. By and through the control of said stock certain other "conspirators," not named as defendants, were from time to time also elected members of "defendant corporation's" board of directors, accepted and assumed the corporate duties and liabilities of such office and served and acted as directors for certain periods of time between January 8, 1929 and August 21, 1942. [Tr. Para. XXIII, pp. 159, 160, 161.]

4. At all times commencing October 11, 1928 and to and including August 21, 1942, each of the individual members of *all* boards of directors of "defendant corporation" who did not become a member of the conspiracy, was a puppet, dummy and the *alter ego* of the conspirators and by them completely dominated to the extent, that in the performance of his official duties and in all his corporate acts, he exercised no independent judgment or discretion but responded to and reflected the will and desire of the conspirators. [Tr. Para. XXIV, p. 161.]

5. On or about the 25th day of May, 1929, the conspirators caused the "defendant corporation" to acquire all of the capital stock and assets of a certain corporation known and described as "Bancitaly Corporation" and to *assume its liabilities* including a certain salary agreement then existing by and between the defendant Amadeo P. Giannini and said Bancitaly Corporation to the effect that for his personal services to be rendered as president of said corporation he should be paid "5% of the net profits of said corporation, per annum, with a guaranteed minimum of \$100,000 per annum," and certain "credit entries" resulting therefrom aggregating approximately \$925,000.00 then upon the books of account of said corporation in favor of defendants Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini (now deceased).

The acquirement of the capital stock and assets of said "Bancitaly Corporation" and the assumption of its liabilities by the "defendant corporation" was caused by the "conspirators" for the purpose and with the intent of each of them to thereafter use said "salary agreement" and "credit entries" as subterfuges and instrumentalities through which to unjustly enrich themselves and enhance

their personal and individual interests, and particularly to enhance the personal and individual interests of the defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), to the detriment of the “defendant corporation” and its shareholders in the following particulars:

(a) “Said salary agreement” had theretofore been created and established by the defendants Amadeo P. Giannini, P. C. Hale and James A. Bacigalupi as a fictitious liability of said “Bancitaly Corporation” and had been used as a subterfuge evidencing apparent legal rights with which to wrongfully obtain, appropriate and convert the funds of said corporation to the individual gain of defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), *by computing the net profits of said corporation upon fictitious, unearned and unrealized profits.* [Tr. Para. XXIV, pp. 162, 163, 164.]

(b) Theretofore, and pursuant to the terms of said “salary agreement” the said “credit entries” which appeared as liabilities of said “Bancitaly Corporation” were each entered upon its books of account and *each item of which, was computed upon fictitious, unearned and unrealized profits.* [Tr. Para. XXVI, pp. 162, 163, 164.]

(c) During a period of time, commencing on or about April 5, 1929, and ending on or about January 11, 1930, pursuant to the terms of said “salary agreement,” the “conspirators” caused the “*defendant corporation*” to make certain fictitious “credit entries,” in favor of the defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), in sums aggregating not less than \$3,700,000.00 upon its books of account, as

purported corporate liabilities, the total credit and each item of which was fictitious and untrue *in that the same did not and truly and correctly represent 5% of the actual and true net profits of the defendant corporation for said period of time or any part thereof, but on the other hand was by the "conspirators" and each of them knowingly computed upon fictitious, unearned and unrealized profits.* [Tr. Para. XXVII, pp. 164, 165, 166.]

(d) Between the 5th day of April, 1929, and the first day of January, 1940, the "conspirators" caused the "defendant corporation" to pay to the defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), substantial sums of money, aggregating not less than approximately \$3,700,000.00, on account of and by reason of said "credit entries" *assumed from the books of account of said "Bancitaly Corporation" and "credit entries" made and entered upon the books of account of the "defendant corporation,"* among which payments are the following:

\$212,852.59 in and during the year 1930;
\$266,977.71 in and during the year 1931;
\$134,826.58 in and during the year 1932;
\$132,896.92 in and during the year 1933;
\$100,596.24 in and during the year 1934;
\$251,952.03 in and during the year 1935;
\$ 65,914.29 in and during the year 1936;
\$ 58,284.37 in and during the year 1937;
\$ 34,000.00 in and during the year 1938; and
\$ 13,346.28 in and during the year 1939;

and by reason of which the “conspirators” and particularly defendants Amadeo P. Giannini and L. M. Giannini and Virgil D. Giannini (now deceased), were from the funds and assets of the defendants corporation unjustly enriched to the serious and irremediable injury and detriment of “defendant corporation” and its shareholders to the extent of at least \$3,700,000.00. [Tr. Para. XXVII, pp. 164, 165, 166 and Para. XXVIII, pp. 166, 167, 168.]

(e) On or about the 17th day of December, 1932, the defendant L. M. Giannini and said Virgil D. Giannini (now deceased), caused the defendant co-partnership “Walston & Co.” to be organized with the defendants Vernon C. Walston, William S. Hoelscher, C. J. Smith, Clifford P. Hoffman, Claire Giannini Hoffman, Charles de Y. Elkus, Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini (now deceased), as its individual members. [Tr. Para. VII, p. 147; Para. XXX, pp. 169, 170.]

(f) On said 17th day of December, 1932, the “defendant corporation” was and had been actively engaged in and enjoying a substantial and profitable investment, security and brokerage business. [Tr. Para XXX, p. 169.]

(g) Thereafter in and during the years 1933, 1934, 1935, 1936, 1937 and 1938 the “conspirators” caused the “defendant corporation” to transfer and divert all of its investment, security and brokerage business to the defendant copartnership “Walston & Co.” [Tr. Para. XXXI, pp. 170, 171.]

(h) In and during said years 1933, 1934, 1935, 1936, 1937 and 1938, the “conspirators” caused the “defendant corporation” to pay and disburse from its funds to said defendant co-partnership “Walston & Co.” large sums of

money as “brokerage” and other fees with respect to security, corporate stock, and other transactions rendered in connection with the business which had been so diverted and transferred and which belonged to the “defendant corporation,” together with other large sums of money for use as capital for said defendant co-partnership aggregating a total sum of not less than approximately \$548,000.00, all of which was thereafter by said co-partnership and its individual members *knowingly* disbursed to and divided between the “conspirators” and particularly the defendants Amadeo P. Giannini, L. M. Giannini, Claire Giannini Hoffman and said Virgil D. Giannini (now deceased), who were thereby from the funds and assets of the “defendant corporation” unjustly enriched to its detriment in the sum of at least approximately \$548,000.00. [Tr. Para. XXXII, pp. 171, 172.]

(1) During the year 1932 the “conspirators” organized a private trust syndicate, having for its purpose speculative operations in the capital stock of the “defendant corporation” and other stocks and securities by purchasing and selling the same upon the various national stock exchanges of the United States, wherein and whereby one Charles J. Smith and one Margaret Mallory were the trustees thereof and the conspirators the beneficiaries.

During said year 1932 a certain corporation named “Bankitaly Mortgage Company” was operating and conducting a general mortgage, real estate, investment and security brokerage business, including speculative operations in the capital stock of the “defendant corporation” and other stocks and securities, by purchasing and selling the same upon the various national stock exchanges of the United States. [Tr. Para. XXXIV, pp. 173, 174.]

(j) Also during said year 1932 the “conspirators” caused the “defendant corporation” to pay and advance from its funds and property substantial sums of money aggregating not less than approximately \$1,500,000.00 to themselves and in particular to the defendants Amadeo P. Giannini, L. M. Giannini and said Virgil D. Giannini (now deceased), which was thereafter used and disbursed by them *to acquire the controlling interest in the capital stock of said “Bankitaly Mortgage Company”* for the purpose of using said company as an instrument to carry out the “conspirators’” speculative stock operations and also for the purpose of *acquiring capital* for such operations the conspirators caused the “defendant corporation” to pay and advance from its funds and assets substantial sums of money aggregating a total of not less than approximately \$1,500,000.00 to and into the treasury of said “Bankitaly Mortgage Company.” [Tr. Para. XXXV, pp. 174, 175.]

(k) During the year 1932 the “conspirators” caused the name of said “Bankitaly Mortgage Company” to be changed to “Pacific Coast Mortgage Company” and thereafter during the years 1933, 1934, 1935, 1936, 1937 and 1938, by and through said “Pacific Coast Mortgage Company” and by and with the use of the conspirators’ positions with the “defendant corporation” and the confidential and special knowledge and information gained thereby, operated and engaged in speculative operations in the capital stock of the “defendant corporation,” and other stocks and securities, by purchasing and selling the same upon the various national stock exchanges of the United States and during said periods of time said “Pacific Coast Mortgage Company” earned and collected a large and substantial profit aggregating a total of not less than ap-

proximately \$2,000,000.00 which was, from time to time, paid to, received and accepted by the conspirators and by reason of which they were, and each of them was, unjustly enriched and particularly the defendants Amadeo P. Giannini and L. M. Giannini and said Virgil D. Giannini (now deceased), to the detriment of the "defendant corporation" in the sum of at least \$2,000,000.00. [Tr. Para. XXXVI, pp. 176, 177.]

(l) During the years 1933, 1934, 1935 and 1936 the "conspirators," caused the "defendant corporation" to pay and advance from its funds and assets substantial sums of money aggregating a total of not less than approximately \$3,000,000.00 to the said trustees, Charles J. Smith and Margaret Mallory *for use as capital* in operating and conducting the business and affairs of said private and secret trust which was used by said trustees and the conspirators for speculative operations in the capital stock of the "defendant corporation," and other stocks and securities, upon the various national stock exchanges of the United States. [Tr. Para. XXXVII, pp. 178, 179.]

(m) During the years 1933, 1934, 1935 and 1936 the "conspirators," by and through said "trust syndicate," and with the use of their official positions with the "defendant corporation" and the special and confidential knowledge and information gained thereby, engaged in the speculative operations in the capital stock of the "defendant corporation," and other stock and securities, by purchasing and selling the same upon the various national stock exchanges of the United States and during said period of time said "trust syndicate" earned and collected a large and substantial profit aggregating a total of not less than approximately \$300,000.00 which was from time to time paid to,

received and accepted by the “conspirators” by reason of which they were, and each of them was, unjustly enriched, to the detriment of the “defendant corporation,” in the sum of at least approximately \$300,000.00. [Tr. Para. XXXVIII, pp. 179, 180.]

(n) During the years 1932, 1933, 1934, 1935, 1936 and 1937, the “conspirators” in conducting their speculative operations in the purchase and sale of the capital stock of the “defendant corporation” and other stocks and securities, by and through said “trust syndicate” and “Bankitaly Mortgage Company” and “Pacific Coast Mortgage Company” caused the “defendant corporation” to engage in the business of manipulating and stirring the market and creating a demand for its capital stock by soliciting orders for the purchase thereof from the general public, with respect to which, the “defendant corporation” incurred large items of expense and suffered substantial losses aggregating a total sum of not less than approximately \$2,250,000.00. [Tr. Para. XXXIX, pp. 180, 181, 182.]

The Concealment of the Wrongful Acts.

(a) Relating to the “Bancitaly Corporation” transactions including the “salary agreement” and “credit entries” [Tr. Paras. XXVI, XXVII and XXVIII, pp. 162, 163, 164, 165, 166, 167 and 168] all of the corporate acts of the “defendant corporation” with respect thereto, *and its general business and affairs, including its assets, liabilities, payments and disbursements*, were by the “conspirators” made to appear and be reflected by records and books of account kept, maintained and manipulated by an involved, intricate and complex system of accounting in con-

flict with the usual, customary, proper and recognized principles of the science of accounting and entirely beyond the knowledge and understanding of the plaintiff concerning such subjects and at all times covered, disguised, concealed and camouflaged by entries and records made under and by false, fictitious, misleading and untrue names and designations and thereby wholly and entirely concealed. [Tr. Para. XXIX, pp. 168, 169.]

(b) Relating to the “Walston & Co.” transactions [Tr. Paras. XXX, XXXI, XXXII, pp. 169, 170, 171, 172], the “conspirators” concealed the same by *withholding* from the corporate records of the “defendant corporation” all reference to said defendant co-partnership and the interests of the conspirators, or any of them, therein and also *withheld* from such records all reference to the acquirement, division and distribution of the earnings and profits of said co-partnership *and which was at all times evidenced by wholly concealed, secret and private agreements and transactions.* [Tr. Para. XXXIII, p. 173.]

(c) Relating to the “Bankitaly Mortgage Company” and “Pacific Coast Mortgage Company” transactions [Tr. Para. XXXIV, XXXV and XXXVI, pp. 173, 174, 175, 176, 177] the “conspirators” concealed the same by failing to make open corporate records thereof in the usual course of business upon the records and books of account of the “defendant corporation” but on the other hand covered, concealed and camouflaged all such transactions by and through purported loans, stock purchases, and other transactions with, secret agents, representatives, and other cor-

porations and associations of the conspirators, including one A. O. Stewart and the A. P. Giannini Company, a corporation. [Tr. Para. XXXV, p. 176; Para. XL, pp. 182, 183.]

(d) Relating to the Smith-Mallory Trust Syndicate transactions [Tr. Para. XXXIV, p. 174 and Paras. XXXVII, XXXVIII, XXXIX, pp. 178, 179, 180, 181, 182], the “conspirators” concealed the same by *withhold- ing* from the corporate records of the “defendant corporation” all information of the relationship of the “conspirators” thereto, and of the secret profits derived therefrom, and the transfer and use of the corporate funds and assets of the “defendant corporation” therein and on the other hand by secretly consummated said transactions through purported loans, other transactions, acts of secret agents and representatives of the “conspirators” and also by failing to conduct such transactions in an open and usual course of business. [Tr. Para XXXVII, pp. 178, 179; Para. XL, pp. 182, 183.]

(e) Relating to *all* the corporate acts of the “defendant corporation” *and its general business and affairs*, including its assets, liabilities, payments and disbursements and involving all of the transactions set forth in subdivisions (a), (b), (c) and (d) hereof, unless the same were entirely withheld from the corporate records, were by the conspirators made to appear and be reflected *by records and books of account kept, maintained and manipulated by an involved, intricate and complex system of accounting in conflict with the usual, customary, proper and recognized principles of the science of accounting and entirely beyond the knowledge and understanding of the appellant with respect to such subjects.*

The Secret Profits and Corporate Losses.

(a) Through the “Bancitaly Corporation,” “salary agreement” and “credit entries” transactions [Tr. Paras. XXVI, XXVII, XXVIII, pp. 162, 163, 164, 165, 166, 167 and 168] the “conspirators” or some of them acquired secret profits *of at least approximately* \$3,700,000. [Tr. Para. XXVII, p. 167.]

(b) From the “Walston & Co.” transactions [Tr. Paras. XXX, XXXI, XXXII, pp. 169, 170, 171 and 172], the “conspirators” acquired secret profits *of at least approximately* \$548,000.00. [Tr. Para. XXXII, p. 172.]

(c) From the “Bankitaly Mortgage Company” and the “Pacific Coast Mortgage Company” transactions the “conspirators” or some of them acquired secret profits *of at least approximately* \$2,000,000. [Tr. Para. XXXVI, p. 177.]

(d) From the Smith-Mallory Trust Syndicate the “conspirators” or some of them acquired secret profits *of at least approximately* \$300,000. and in which transactions the “defendant corporation” was caused *a loss of at least approximately* \$2,250,000.00. [Tr. Para. XXXVIII, p. 180.]

The Alternate and Hypothetical Liability Of Appellees.

Each individual member of *all* the several “boards of directors” of the “defendant corporation” who was not a member of the conspiracy, if any, was a puppet, dummy and the *alter ego* of the “conspirators” and by them at all times completely dominated to the extent that, in the per-

formance of his official duties and in all the corporate acts of the "defendant corporation" and particularly the corporate acts and transactions here involved, said dummy and puppet director exercised no independent judgment or discretion but, at all times, responded to and reflected the will and desire of the "conspirators," and, any individual member of such boards of directors, *who was not a member of said conspiracy nor a puppet and dummy director, either failed to discover any of the wrongful acts of the conspirators or on the other hand, having discovered the same, knowingly and in disregard of his official duty, failed to take action to redress or prevent the continuance of such wrongful acts or to cause such action to be taken.* [Tr. Paras. XXIV and XXV, pp. 161, 162.]

**The Discovery of Suspicious
Circumstances Regarding
Corporate Mismanagement.**

The appellant was, until on or about the 27th day of April, 1939, *wholly ignorant, and had no knowledge, notice or information, of any kind or character concerning the wrongful acts of the "conspirators" nor with respect to any illegal or wrongful conduct of the "conspirators" concerning their management of the assets or of the conduct of the business and affairs of the "defendant corporation,"* but on the other hand reposed full and complete confidence in the integrity and good faith of the defendant Amadeo P. Giannini and each and all of his "co-conspirators" in the management and operation of the assets, business and affairs of the "defendant corporation" *until on or about said 27th day of April, 1939, when, for the first time, a certain "quasi judicial" proceeding pending before the Securities and Exchange Commission of the United*

States, *was called to her attention*, which she thereupon investigated and ascertained, among other things, that the commission had theretofore ordered a hearing for the taking of testimony to determine whether or not the capital stock of the "defendant corporation" should be suspended or withdrawn from certain national stock exchanges by reason of false and misleading statements of material facts including financial statements of the "defendant corporation" which did not correctly reflect its true financial condition and which the commission had reasonable ground to believe had been made in said "defendant corporation's" application for registration of its capital stock upon said stock exchanges. *For the first time* appellant ascertained the charges contained in said "order for hearing," a printed official copy of which is filed herein, as part of appellant's "pleading" *and shows the nature and extent of appellant's first discovery of suspicious circumstances concerning management of the "defendant corporation's" affairs.* [Tr. 417-445.]

With respect to said proceeding and the contents of said order for hearing, appellant, *prior to April 27, 1939, had no notice, knowledge or information of any kind or character whatsoever concerning the same nor did she have any reason to suspect the existence of the charges therein related nor did she have any reason to suspect the "conspirators" or any or either of them of wrong doing concerning the conduct of the business and affairs of the defendant corporation.*

The facts, and other matters set forth in said order for hearing, were developed slowly through certain detailed examinations and audits of the corporate records and books of account of the "defendant corporation" by

expert accountants on behalf of said commission and were presented to said commission by the testimony of unwilling and hostile witnesses through examinations conducted by experienced lawyers and said proceeding is still pending and undetermined. [Tr. Para. XLI, pp. 183, 184, 185 and 186.]

**The Futility of Requesting
Action by the Board of
Directors or Shareholders.**

All of the individual members of the several boards of directors of the "defendant corporation" at all times up to and including the date of the filing of appellant's "pleading" are sued as defendants or otherwise named and charged with the commission of the wrongs involved. At all such times as the "conspirators" herein, had the complete control of the voting shares of the capital stock of "defendant corporation" and exercised such control. The appellant with knowledge of such facts made no demand of the board of directors of "defendant corporation," to institute an action to redress the wrongs involved herein as such an action to be effective and complete, must be directed against all of the "conspirators." That such a demand by appellant upon said the board of directors would be a futile and an idle act. [Tr. Para. XLII, p. 187.]

The total issued and outstanding voting shares of the capital stock of the "defendant corporation" are owned and held by approximately two hundred thousand individuals residing and scattered in substantially all the States and Territories of the United States and numerous foreign countries including Australia, Azores, Belgium, Brazil,

Canada, China, Czecho-Slovakia, Denmark, Dutch East Indies, East Indies, England, France, Greece, Germany, Hawaii, Holland, India, Ireland, Italy, Japan, Mexico, New Zealand, Panama Canal Zone, Palestine, Philippine Islands, Peru, Poland, Porto Rico, Portugal, Roumania, Samoan Islands, Scotland, South Africa, Sweden, Switzerland, Spain and West Indies, and appellant made no demand upon said shareholders as a body to cause action to be taken to remedy the wrongs involved herein or to prevent the continued perpetration thereof as to be effective such a demand would first require an expensive and prolonged struggle with the "conspirators" to wrest from them control of the voting shares of stock of "defendant corporation," which struggle would also be a futile and an idle act.

The Appellees' Motions to Dismiss.

After the filing of the appellant's second amended complaint, without limitation or restriction [Tr. 142] by the court, the appellees, in separate groups, by and through their respective attorneys filed motions to dismiss appellant's action based upon the following grounds:

Note:

In order to avoid error, we have set forth verbatim each ground of each motion to dismiss.

1. By Cosgrove & O'Neil, attorneys for Amadeo P. Giannini, individually and as executor. [Tr. 193, 194, 195.]

(a) Because the second amended complaint fails to state a claim against defendant upon which relief can be granted;

(b) Because the alleged claim set forth in said second amended complaint against defendant is barred by the provisions of Section 388, Subdivision 4 and Section 339, Subdivision 1 of the Code of Civil Procedure of the State of California;

(c) Because the alleged claim set forth in said second amended complaint is barred by the laches of plaintiff in failing to use diligence in the prosecution of said claim and by the long delay in making defendant, as executor, party to this action, which lack of diligence and delay have been highly prejudicial to said defendants;

(d) Because there is a failure to include indispensable parties defendant as parties to the action, to-wit, the subsidiaries of the defendant Transamerica Corporation which are alleged to have suffered injury and detriment by the acts complained of;

(e) Because the court lacks jurisdiction and the second amended complaint fails to state a claim against defendants upon which relief can be granted for the reason that the second amended complaint sets forth certain injury and damage to the subsidiaries of Transamerica Corporation and fails to allege that plaintiff was a stockholder in such subsidiaries or any of them;

(f) Because the complaint consists entirely of sham, irrelevant, redundant and evasive allegations and is not in compliance with the directions of the above court in granting to plaintiff permission to file a second amended complaint and fails to set forth the undisputed facts that on December 9, 1931, the stockholders of Transamerica Corporation, including plaintiff, were sent a letter advising them that A. F. Giannini had received for the compensa-

tion the credits referred to in the second amended complaint and had withdrawn all but \$792,000 thereof and that the board of directors of Transamerica upon advice of counsel had refused to pay defendant A. P. Giannini said balance; and that plaintiff had notice thereafter, in February, 1932, A. P. Giannini was reelected a director and officer of said corporation; and

(g) Because plaintiff has entirely disregarded the directions of this court at the time of the hearing of the motions herein directed to the first amended complaint with regard to setting up her causes of action in separate counts.

2. By Tanner, Odell & Taft in behalf of appellee Herbert E. White. [Tr. 296, 297, 298.]

(a) Because the second amended complaint fails to state a claim against defendant upon which relief can be granted.

(b) Because the alleged claim set forth in said second amended complaint against defendant is barred by the provisions of Section 338, subdivision 4, and Section 339, subdivision 1 of the Code of Civil Procedure of the State of California;

(c) Because the alleged claim set forth in said second amended complaint is barred by the laches of plaintiff in failing to use diligence in the prosecution of said claim and by the long delay in making this defendant a party to this action, which lack of diligence and delay have been highly prejudicial to this defendant.

(d) Because there is a failure to include indispensable parties defendant as parties to the action, to-wit, the subsidiaries of defendant Transamerica Corporation which

are alleged to have suffered injury and detriment by the acts complained of.

(e) Because the court lacks jurisdiction and the second amended complaint fails to state a claim against defendant upon which relief can be granted for the reason that the second amended complaint sets forth certain injury and damage to the subsidiaries of Transamerica Corporation and fails to allege that plaintiff was a stockholder of such subsidiaries or any of them.

(f) Because the complaint consists entirely of sham, irrelevant, redundant and evasive allegations and is not in compliance with the directions of the above court in granting to plaintiff permission to file a second amended complaint and fails to set forth the undisputed facts that on December 9, 1931, the stockholders of Transamerica Corporation, including plaintiff were sent a letter advising them that A. P. Giannini had received for his compensation the credits referred to in the second amended complaint, and had withdrawn but \$792,000 thereof, and that the board of directors of Transamerica upon advice of counsel had refused to pay defendant A. P. Giannini said balance and that plaintiff had notice that thereafter in February, 1932, A. P. Giannini was reelected a director and officer of said corporation.

(g) Because plaintiff has entirely disregarded the directions of this court at the time of the hearing of the motions herein directed at the first amended complaint with regard to setting up her causes of action in separate counts.

3. By Keyes & Erskine, Herbert W. Erskine and Louis Ferrari, in behalf of certain appellees. [Tr. 256, 257, 258.]

(a) Because the second amended complaint fails to state a claim against the said defendants jointly, or against any one or more of them jointly with others, or against any of said defendants severally, upon which relief can be granted.

(b) Because the alleged claim set forth in said second amended complaint against these defendants jointly and severally is barred by the provisions of Section 388, subdivision 4; Section 339, subdivision 1, and Section 343 of the Code of Civil Procedure.

(c) Because the alleged claim set forth in said second amended complaint against these defendants jointly and severally is barred by the laches of said plaintiff in failing to use due diligence in the prosecution of said claim and by the long delay in filing this action, which lack of diligence and delay have been wholly prejudicial to these defendants; and because as to certain of the defendants joining in this motion the plaintiff has been guilty of gross laches and prejudicial delay in not sooner making said defendants parties to this action;

(d) Because there is a failure to include indispensable parties defendant as parties to the second amended complaint in that the subsidiaries of the defendant Transamerica Corporation which are alleged to have suffered the injury and detriment by reason of the matters set forth in said second amended complaint are not named parties therein;

(e) Because the court lacks jurisdiction for the reason that the second amended complaint sets forth certain injury and damage to the subsidiaries of Transamerica and fails to set forth that the plaintiff was a stockholder of such subsidiaries or any of them;

(f) Because the complaint consists entirely of sham, irrelevant, redundant and evasive allegations and is not in compliance with the directions of the above court in granting to plaintiff permission to file a second amended complaint and fails to set forth the undisputed facts that on December 9, 1931, the stockholders of Transamerca Corporation, including plaintiff here were sent a letter advising them that A. P. Giannini had received for his compensation the credits referred to in the second amended complaint and had withdrawn all but \$70,000.00 thereof and that plaintiff had notice that thereafter on February, 1932, A. P. Giannini was reelected a director and officer of said corporation.

(g) Because the said plaintiff has entirely disregarded the direction of this court at the time of the hearing of the motions to dismiss the first amended complaint and with regard to setting up the causes of action in separate counts that others who were directors of the corporation or otherwise participated in the transactions complained of could set forth their defenses that such portions of the complaint as concerned them and would not be called upon to answer or defend against charges made against other defendants with regard to transactions with which they were in nowise concerned.

4. By George D. Schilling and G. L. Berrey for appellee, Bank of America National Trust and Savings Association as Administrator-With-the-Will-Annexed of the Estate of John M. Grant, Deceased. [Tr. 238, 239, 240.]

1. To dismiss the action because the second amended complaint and each cause of action therein attempted to be stated fails to state a claim against this moving defendant upon which relief can be granted. Said motion is based upon the following grounds:

(1) The complaint is generally insufficient to charge the defendants with any wrongful act or omission all the allegations in that behalf being the pleader's conclusions.

(2) The complaint fails to show that any claim has been filed with the defendant Bank of America National Trust & Savings Association as administrator with the will annexed of the estate of John M. Grant, deceased.

(3) The complaint fails to show any demand upon the directors or the stockholders to maintain this action or any valid excuse for failure to make such demand.

(4) The claims set forth in the second amended complaint against this moving defendant are barred by the laches of the plaintiff in failing to use due diligence in the commencement and prosecution of this action, which lack of diligence is prejudicial to this moving defendant.

(5) There is a failure to include as parties defendant or parties plaintiff persons who are indispensable parties to this action in that subsidiaries of the defendant Transamerica Corporation which are alleged to have suffered injury and detriment by reason of matters set forth in the second amended complaint are not named as parties herein.

(6) The court lacks jurisdiction of the subject matter of this action for the reason that the second amended complaint sets forth certain injuries and damages to subsidiaries of Transamerica Corporation and fails to set forth that the plaintiff was a stockholder of such subsidiaries or any of them.

(7) The complaint consists entirely of sham, irrelevant, redundant and evasive allegations and is not in compliance with the directions of the court in granting plaintiff permission to file a second amended complaint.

(8) The plaintiff has wholly disregarded the directions of the court given at the hearing of the motions to dismiss the first amended complaint whereby plaintiff was required to state her causes of action separately.

5. By Bacigalupi, Elkus & Salinger and Claude M. Rosenberg, for certain appellees. [Tr. 283, 284, 285.]

(1) That said second amended complaint fails to state a claim against the moving defendants or any of them upon which relief can be granted for the reason that the alleged claims set forth therein against said moving defendants, jointly and severally are barred by the provisions of Section 338 (4), Section 339 (1) and Section 343 of the Code of Civil Procedure of the State of California.

(2) That said second amended complaint fails to state a cause of action against the moving defendants or any of them upon which relief can be granted for the reason that the alleged claims set forth therein against said moving defendants jointly and severally are barred by laches of plaintiff in delaying unduly the institution of this suit to the prejudice of the moving defendants and each of them.

(3) That there is a failure to set forth with particularity sufficient excuse for plaintiff's admitted failure to endeavor to have the board of directors of Transamerica Corporation bring this action.

(4) That there is a failure to allege an effort by plaintiff to obtain action by the stockholders of Transamerica Corporation or any sufficient excuse for not doing so.

(5) That failure claims are asserted in said second amended complaint founded upon separate and different transactions and occurrences without being stated in sepa-

rate counts, as required by Rule 10 (b) of the Rules of Civil Procedure for the District Court of the United States and contrary to the directions and order of the above entitled court upon the hearing of the motions previously addressed to the first amended complaint herein.

6. By Russ Avery and Gordon Grey for certain appellees. [Tr. 218, 219.]

1. Because the second amended complaint fails to state a claim against these defendants or any of them upon which relief can be granted;

2. Because there is a lack of indispensable parties defendant, to-wit, the subsidiaries of defendant Trans-america corporation which are alleged to have suffered injury and detriment by the acts complained of;

3. Because the alleged claim set forth in said second amended complaint against these defendants and particularly against defendants Theodore M. Stuart and L. M. Giannini, as an alleged partner of Walston & Co. is barred by the provisions of Section 338, subdivision 4 and Section 339, subdivision 1 of the Code of Civil Procedure of the State of California; and

4. Because the alleged claim set forth in said second amended complaint against defendants and particularly against defendants Theodore M. Stuart and L. M. Giannini as an alleged partner of Walston & Co. is barred by the laches of plaintiff in failing to use diligence in the prosecution of said claim and particularly by the long delay in making the defendants Theodore M. Stuart and L. M. Giannini as an alleged partner of Walston & Co. parties to this transaction in the original complaint, lack of diligence and delay have been highly prejudicial to said defendants.

5. Because the court lacks jurisdiction for the reason that the second amended complaint sets forth certain injuries and damage to the subsidiaries of Transamerica Corporation and fails to set forth that the plaintiff is or ever was a stockholder of such subsidiaries or any of them.

6. Because the second amended complaint consists entirely of sham, irrelevant, redundant and evasive allegations of specific facts and is not in compliance with the directions and conditions of the above entitled court in granting to plaintiff permission to file a second amended complaint.

7. Because the plaintiff has completely disregarded the direction of this court at the time of the hearing of the motions to dismiss the first amended complaint requiring the plaintiff to set up her several causes of action in separate counts and that the various defendants whether directors or otherwise, could set forth their several separate defenses to such portions of the second amended complaint as specifically concern them.

Order Granting Motions to Dismiss.

On April 16, 1943, the District Court made its order that each and all of the motions filed on behalf of the respective defendants (appellees) to dismiss the second amended complaint be granted. [Tr. p. 320.]

Final Judgment of Dismissal.

On June 9, 1943, the District Court made and caused to be docketed its final "judgment of dismissal" of appellant's action based only upon its order of April 16, 1943, granting appellees several motions to dismiss [Tr. 448, 449, 450, 451] for the reasons, set forth in the court's "Memorandum of Conclusions," which will be hereafter discussed. [Tr. 321-360.]

SPECIFICATIONS OF ERRORS.

Note:

The appellant's "statement of points" upon which she intends to rely on the appeal and which were filed in the District Court [Tr. 492, 493, 494] were by reference adopted as her "statement of points" required by Subdivision 6 of Rule 19 of this court. [Tr. 516, 517.]

For convenience we group appellant's "specifications of error" in relation to each point so stated.

Point I.

This point [Tr. 492] is in the following language:

"The court's conclusion contained in its memorandum at pages 15 and 16 that:

'While the plaintiff charges that all of the defendants and said forty-four other persons committed fraudulent and illegal acts—recitals which are but legal conclusions—her pleading fails to set forth with particularity the ultimate facts and circumstances constituting the alleged fraud and illegality.'
is erroneous."

The District Court's conclusion set forth in Point I is erroneous in the following particulars:

SPECIFICATIONS.

(a) The plaintiff's second amended complaint does not charge the conspirators with having committed fraudulent and illegal acts by recitals which are but legal conclusions.

(b) Conclusions of a pleader are not improper in averring the circumstances constituting fraud where such conclusions give sufficient particularity to determine the nature of the claim and afford fair notice thereof.

(c) While the result of the acts charged against the conspirators may be considered an actual fraud yet the legal nature of appellant's claim is still one for an accounting of secret profits and corporate losses; and is sufficiently definite to enable the defendants to frame an answer thereto and understand the nature and the extent of the charge.

(d) Allegations of ultimate facts and particular circumstances, relating to fraud and illegality, are unnecessary where such facts and circumstances are or should be peculiarly within the knowledge of the wrongdoers and the evidence thereof under their control.

Point II.

This point [Tr. 492] is in the following language:

“The court's conclusion, contained in its memorandum at page 28, that

‘if the bar of the Statute of Limitations or of laches is to be avoided it will be necessary for plaintiff to plead other facts besides those set forth in her second amended complaint.’

is erroneous.”

The District Court's conclusion set forth in Point II is erroneous in the following particulars:

SPECIFICATIONS.

(a) The bar of the Statute of Limitations does not commence to run against a *concealed fraud* until the actual or legal discovery thereof.

(b) The doctrine of laches does not apply to a *concealed fraud*, nor does it attach until the same is actually discovered.

(c) The doctrine of laches in no event applies unless the delay is shown, by circumstances, to have caused prejudice in some substantial manner. This does not appear upon the face of the second amended complaint. It is a subject only for an affirmative defense and supporting proof.

(d) The facts and circumstances pleaded in the second amended complaint are sufficient to avoid laches and to show diligence on the part of the appellant in commencing the action.

Point III.

This point [Tr. 493] is in the following language:

“The court’s conclusion in referring to the plaintiff’s second amended complaint contained in its memorandum at page 30 that:

‘It is replete with surplusage and repetitions as well as legal conclusions, including numerous recitals, more or less general, vague and indefinite * * *.’
is erroneous.”

The District Court’s conclusion set forth in Point III is erroneous in the following particulars:

SPECIFICATIONS.

(a) The second amended complaint is not replete with surplusage and repetitions which in any manner tend to cloud the nature of appellant’s claim or render the same unduly indefinite.

(b) The second amended complaint is not replete with legal conclusions, nor does it include recitals which are more or less general, vague and indefinite, which in any manner tend to cloud the nature of the appellant’s claim.

(c) Whatever surplusage or repetitions occur, if any, in the averments of the second amended complaint they are insufficient to justify a dismissal of appellant's action.

(d) Legal conclusions and general vague and indefinite recitals, if any, set forth in the second amended complaint, are insufficient to justify a dismissal of appellant's action.

Point IV.

This point [Tr. 493] is in the following language:

"The court's conclusion contained in its memorandum at page 35 that:

'before it can be held that plaintiff has a cause or causes of action against defendants or any of them, and likewise before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint.'

is erroneous."

The District Court's conclusions set forth in Point IV is erroneous in the following particulars:

SPECIFICATIONS.

(a) Matters other than those alleged in the second amended complaint, are unnecessary to justify the filing of appellant's action upon the date it was so filed.

(b) The facts and circumstances alleged in the second amended complaint are sufficient to justify the filing of appellant's action upon the date indicated, and are sufficient to avoid the application of the doctrine of laches and the bar of the Statute of Limitations.

(c) Other matters besides those pleaded in the second amended complaint, are unnecessary in order to avoid a dismissal of the appellant's action.

Point V.

This point [Tr. 493] is in the following language:

“The court's conclusion, contained in its memorandum, page 37, that:

‘each and all of the respective motions to dismiss should be granted.’

is erroneous.”

The District Court's conclusion set forth in Point V is erroneous in the following particulars:

SPECIFICATIONS.

(a) The second amended complaint, under the circumstances of the case, sufficiently sets forth a short and plain statement of the appellant's claim, showing that she is entitled to relief, by simple, concise and direct averments and with sufficient particularity and definiteness to inform the appellees of the nature of appellant's claim and permit the framing of an answer thereto.

(b) The second amended complaint contains averment of all elements necessary to state a claim of the character involved and upon its face discloses no defense thereto.

(c) The second amended complaint was not filed subject to any limitations or restrictions imposed by the District Court with respect to any legal theory or fact nor was it filed contrary to or in violation of any such order or direction.

(d) The corporate subsidiaries, departments and instrumentalities of the defendant corporation are neither necessary nor indispensable parties defendant to appellant's action and their omission as such does not justify a dismissal thereof.

(e) The appellant's claim set forth in the second amended complaint is not barred by subdivision 4 of Section 388 nor by subdivision 1 of Section 339 of the Code of Civil Procedure of the state of California.

((f) The appellant's claim set forth in the second amended complaint is not barred by the laches of appellant in failing to use diligence in the prosecution thereof nor is there any showing upon the face thereof that delay has been in any manner prejudicial to the appellees.

(g) To sustain appellant's action or confer jurisdiction upon the district court, it is unnecessary that appellant be a shareholder of any of the defendant corporation's corporate subsidiaries, departments or instrumentalities.

(h) The court received and considered evidence in deciding and granting the appellee's several motions to dismiss.

(i) The court received and considered evidence in giving a final judgment of dismissal of appellant's cause of action, based only upon the several motions to dismiss.

(j) In an action based upon a tort committed by a person who has since deceased, it is unnecessary to file a claim with his administrators or executors.

(k) The allegations of the second amended complaint show a valid excuse for appellant's failure to make a demand upon the directors or the shareholders of the defendant corporation to institute action for relief.

(l) The allegations of the second amended complaint set forth but a single claim or cause of action and a division thereof into separate counts would be erroneous and obstruct rather than facilitate the clear presentation of the matters set forth.

(m) The mere failure of a director of a corporation to be reelected does not constitute a legal withdrawal from a "continuing conspiracy of all directors" to use the corporate funds and property for secret private gain.

Point VI.

This point [Tr. 493, 494] is in the following language:

"The court's order, contained in the minute order of April 16, 1943, that:

'each and all of the motions filed on behalf of the respective defendants to dismiss the second amended complaint be granted.'

is erroneous."

The District Court's order set forth in Point VI is erroneous in the following particulars:

SPECIFICATIONS.

1. For brevity and convenience appellant hereby refers to and adopts Specifications (a) to (m), inclusive, of Point V as her specifications of error for this point.

Point VII.

This point [Tr. 494] is in the following language:

“The court erred in making and giving the final judgment and decree dismissing plaintiff’s cause of action which was filed and entered June 9th, 1943.”

The District Court’s judgment set forth in Point VII is erroneous in the following particulars:

SPECIFICATIONS.

For brevity and convenience appellant hereby refers to and adopts Specifications (a) to (m), inclusive, of Point V as her specifications of error for this point.

ARGUMENT.

PART ONE.

Relating to Point I [Tr. 492], Specifications (a) to (d) (Br. pp. 35-36), Point III [Tr. 493], Specifications (a) to (d) (Br. pp. 37-38), Point V [Tr. 493], Specification (a) (Br. p. 39), Point VI [Tr. 493, 494], Specification (a) (Br. p. 41), Point VII [Tr. 494], Specification (a) (Br. p. 42).

Note:

1. The parties will hereafter be mentioned as the “appellant” and “appellees.”

2. The second amended complaint will be designated the “pleading.”

3. We limit our argument to the points presented by the appellees’ “motions to dismiss.” No other motion was determined or decided.

4. As the District Court’s “conclusions,” mentioned in Points I and III, each relate to the “form” of the language used in appellant’s “pleading,” we have grouped the same and their “specifications of error,” for this discussion.

5. In this discussion we assume that the court’s “conclusions” and other remarks noted are intended to mean that the language of the “pleading” is so general, vague and indefinite and contains so many legal conclusions as to render it insufficient to state a claim.

* * * * *

As a predicate for our remarks we first direct the court’s attention to the fact that by her action appellant seeks equitable relief, in what is known as a “shareholder’s derivative suit,” by requiring the directors and managing

officers to account to the defendant corporation for secret profits, use of corporate money, and corporate losses. *It is not a common law action to recover money paid or damages based upon numerous independent transactions.* A shareholder of a corporation has no right to maintain such latter action. It is only by a *judicial accounting in equality* that a proper judgment may be rendered which grants the relief appellant seeks.

As hereinafter discussed the “defendant corporation” and its corporate subsidiaries, departments and instrumentalities are, for the purpose of this suit, *a single unit* which in contemplation of law is the “defendant corporation” and of which the appellant was and is a shareholder.

We feel that the character of this action should, at all times, be borne in mind when applying the new rules to the averments of the “pleading.”

Rule 8 of the Federal Rules of Civil Procedure provides among other things as follows:

(a) “A pleading which sets forth a claim for relief * * * shall contain * * *

(2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *.”

(c) (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms in pleadings or motions are required.”

Rule 9 provides among other things as follows:

(f) “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity * * *.”

It seems that the District Court, in granting the several motions to dismiss, has erroneously imposed the obsolete rules of pleading and failed to recognize that under the present rules "legal conclusions" are not prohibited but on the other hand are expressly permitted where they tend to a simple, concise and direct statement of a claim. The "official forms" contained in the Federal Rules of Civil Procedure contains many so-called legal conclusions, which in that respect, illustrate the sufficiency of the "pleading."

Our thought regarding the subject of pleading is best expressed by the following quotation from an article authored by James A. Pike of Washington, D. C., and John W. Willis of Los Angeles, California, which appears in 38 Columbia Law Review, 1179, as follows:

"The new Federal Rules of Civil Procedure do not proceed upon the assumption that the function of pleading is to prepare the case for trial. It is recognized that the 'issue-pleading' of the common law does not sift out the real issues, the 'fact-pleading' of the codes the real facts. *The generality of allegation contemplated by the Rules indicates the influence of the newer concept of 'notice pleading'*: the object of the complaint is to indicate to the defendant which grievance is being pressed; the object of the answer is to indicate to the plaintiff which defenses are being relied upon. What have been thought to be the objects of pleading—the narrowing of the issues, the revelation of facts—will be served by several devices more precisely adapted to their fulfillment: The familiar motions for certainty, the new pre-trial hearing, and the not new but completely renovated procedure for depositions and discovery."

In the case of *Securities & Exchange Commission v. Timetrust, Inc., et al.*, 28 Fed. Supp. 34, the plaintiff Commission sought to enjoin the defendants from using the mails in violation of the Anti-Fraud provisions of the Securities Act of 1933 as amended, charging, among other things, that defendants Bank of America, A. P. Giannini, L. Mario Giannini and John M. Grant were aiding, abetting and participating in such violations.

The complaint was held sufficient as against motions to dismiss, for a more definite statement or bill of particulars, and to strike alleged redundant and immaterial matters.

It is alleged that "Timetrust" was formed to aid in the sale of Bank of America stock, that the defendants in the sale of such stock, by use of the mails, employed a scheme to defraud the purchasers and sets forth the mechanics for the operation of a plan in furtherance of such scheme. The defendants, A. P. Giannini, L. Mario Giannini, John M. Grant and the Bank of America by its motions claim the complaint defective with respect to its allegations of their "aiding and abetting" the actions of the defendant Timetrust. As the motions in that case present substantially the same points relied upon by the appellees in the present action, and mentioned in the court's "conclusions," we deem it useful to here set forth the language of the complaint which was there under attack (Opinion p. 43):

"Timetrust, Incorporated, was organized * * *, and has been and still is being operated * * * with the active support and assistance of defendants A. P. Giannini, L. Mario Giannini, John M. Grant, and Bank of America National Trust & Savings Association;" that the "defendants Timetrust, Incorporated, Meredith Parker, Ralph

W. Wood and H. E. Blanchett, *aided and abetted* by the defendants A. P. Giannini, L. Mario Giannini, John M. Grant and Bank of America National Trust & Savings Association, have, since on or about August 11, 1938, in the sale of securities, viz., Timetrust certificates and common stock of Bank of America National Trust & Savings Association, *by the use of the mails, employed and are now employing a device, scheme and artifice to defraud the purchasers of such securities;*" and that "from August 11, 1938, Timetrust, Incorporated, and its officers, directors, agents, and sales personnel *at the aid and abetment of defendants* A. P. Giannini, L. Mario Giannini, John M. Grant and Bank of America National Trust & Savings Association, *in the sale of securities, namely, said Timetrust certificates and said common stock of Bank of America National Trust & Savings Association, by the use of the mails directly and indirectly, obtained and are now obtaining money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading.*"

The court in holding such language sufficient, states as follows (Opinion pp. 41 and 42):

"The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice, is all that is required. Pleadings shall be so construed as to do substantial justice * * *

At a meeting in Cleveland, Mr. Charles E. Clark, Dean of the Law School of Yale University and a

member of the Advisory Committee, led the discussion upon pleadings and motions. Mr. Clark stated that he heard from a lawyer who criticized this portion of the Rules. The lawyer said, 'Why a sixteen-year-old boy could plead under these rules!' 'Well, I would say, in answer,' observed Mr. Clark, 'why not, if he tells the court what his case is about?' And that is what we are trying to ask the lawyers to do, and to do it quite simply. It is in this liberal spirit of the new rules that defendant's criticism of the complaint will be considered. * * *."

The court further states in denying defendant's motion for a more definite statement or bill of particulars, as follows (Opinion p. 44):

"Because of the liberal view taken by the court in holding the complaint sufficient, it is unnecessary to give serious consideration to defendant's motion to strike. Perfection in pleading is rare. There may be allegations in the complaint which might have been more briefly and clearly stated and some sentences which might properly have been left out, but this kind of criticism could be urged in all cases. Prolixity is a besetting sin of most pleaders. *Courts should deal with the substance, and not the form of the language of the pleadings.* Where no harm will result from immaterial matter not affecting the substance, court's should hesitate to disturb a pleading. Another consideration in such circumstances, is that to grant the motion would delay bringing the case to a speedy trial."

Note:

A final judgment based upon the same complaint to which the defendants unsuccessfully objected in the above case, was later rendered by the District Court, wherein the injunction sought by the Securities & Exchange Commission was granted (39 Fed. Supp. 45) and from which an appeal was taken and is now pending in this court. (No. 9823.)

The decision of Judge St. Sure in the Timetrust case last above discussed is obviously an adaptation of the new mode of "notice-pleading" and is cited with approval by the Circuit Court of Appeals (3rd Cir.) in *Continental Collieries, Inc. v. Shober*, 130 Fed. (2d) 631, wherein the District Court's order granting a motion to dismiss was reversed.

While the facts involved in the latter case are not comparable with the ones in the present case, yet the principle or doctrine to be applied to a pleading is identical and is there stated in the following language (Op. p. 635):

"Under the Federal Rules of Civil Procedure, the function of the complaint is to afford *fair notice* to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved. * * * Under Rule 8 (a) (2) of the Federal Rules a plaintiff 'sets forth a claim for relief, when he makes 'a short and plain statement of the claim showing that the pleader is entitled to relief. * * * Technicalities are no longer of their former importance and a short statement which *fairly gives notice* of the nature of the claim is a sufficient compliance with the requirements of the rules."

The decision in this case also determines the *functions* of a "motion to dismiss for failure to state a claim" and the *limitations thereof*, which are in the present action directly involved. (Opinion p. 635):

"While most defenses are to be pleaded affirmatively under the Federal Rules, Rule 12 (b) (6) provides that the defense may take the form of a motion to dismiss for 'failure to state a claim upon which relief can be granted.' As observed in *Leimer v. State Mutual Life Assur. Co.*, 8 Cir., 108 F. (2d) 302, 305, 306, such a motion, of course, serves a useful purpose where, for instance, a complaint states a claim based upon a wrong for which there is *clearly no remedy*, or a claim which the plaintiff is *without right or power to assert* and for which no relief could possibly be granted to him, or a claim which the averments of the complaint show *conclusively* to be barred by limitations. However, the court in the *Leimer* case went on to admonish that there is no justification for dismissing a complaint for insufficiency of statement, *except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim.* * * * No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, *to an opportunity to try to prove it.*"

The case of *DeLoach et al. v. Crowleys, Inc.*, 128 Fed. (2d) 378, is an action under the Fair Labor Standards Act for wages and overtime. A motion to dismiss was granted by the District Court upon the ground that the petition did not show that plaintiffs were employed in commerce or in the production of goods for commerce,

and if they were shown, it appears that plaintiffs were excepted from the wage and overtime provisions of the Act.

The court states in its decision (Op. p. 379), that the allegations of the petition are not simple and direct as intended by the Rules of Civil Procedure, not so clear as would be desirable, and (Op. p. 380) that it could not be certainly told from the petition whether the plaintiffs as truck drivers come within the exception to the Act relating to overtime provisions.

In reversing the judgment of the District Court and determining that it was error to dismiss the petition on motion, the court states (Op. p. 380) :

“Under the Rules of Civil Procedure a case consists not in the pleadings but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings. Demurrers are abolished. A petition may be dismissed on motion if *clearly* without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some facts which will necessarily defeat the claim. *But the principle is no longer in force that pleadings will be construed strictly against the pleader.* Rule 8 (f) says that, ‘All pleadings shall be so construed as to do substantial justice.’ Just what this means is not clear but it excludes requiring technical exactness, *or the making of refined inferences against the pleader, and requires an effort to understand what he attempts to set forth.* Expensive trial of meritless

claims are sought to be avoided in the matter by pre-trial and summary judgment procedures. We think this petition should not therefore be dismissed on motion.”

In *Fleming v. Dierkes Lumber & Coal Co.*, 39 Fed. Supp. 237, which is an action to enjoin the defendant from violating the Fair Labor Standards Act, the District Court, in denying in part and granting in part the defendants’ motion for a more definite statement or bill of particulars, refers to the case of *Louisiana Farmers Protective Union, Inc. v. Great Atlantic & Pacific Tea Company of America, Inc.*, 31 Fed. Supp. 483, as sustaining certain well-established principles which relate to the consideration of pleadings which are attacked by motions and groups the same as follows (Op. pp. 239, 240):

“(1) The granting or refusal of a motion for a bill of particulars rests in the sound discretion of the court.

(2) Matters of evidence which a party will presumably introduce as establishing his case shall not be elicited or required by a motion for a bill of particulars.

(3) Ordinarily a bill of particulars will not be ordered as to *matters that are peculiarly within the knowledge of the moving party.*

(4) The scope of a bill of particulars should ordinarily be limited to such matters as are required to enable the moving party *to prepare his responsive pleading and generally to prepare for trial.* Rule 8 (a) (2) provides that the plaintiff shall make ‘a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled.’

In Moore's Federal Procedure, Volume 1, page 553, it is said: 'what constituted good craftsmanship in pleading before the rules will continue to constitute good craftsmanship, but in ruling on the sufficiency of a pleading that is on the borderline, the court should consider:

(1) At what stage of the action is the objection raised?

(2) Are the *prima facie* elements of the claim or defense stated?

(3) *If these are stated, is the statement fair notice to the adverse party?*

(4) Is it feasible to require more particularity?

The court should not feel bound by restrictive decisions to what constitutes facts, evidence or conclusions of law.' "

It now seems well established that, *even upon a motion for a more definite statement or a bill of particulars*, matters which should be more peculiarly within the knowledge of the moving party than that of his adversary will not ordinarily be required and that the scope of a bill of particulars, if required, should be limited to such matters as are necessary to enable the moving party *to prepare his responsive pleading and generally prepare for trial.*

The decisions, in the above respect, should be especially applicable to a "shareholder's derivative suit" and particularly where the wrongful acts caused by the moving parties, are concealed from the shareholders, as in the present case.

To further illustrate the error of the District Court in granting the motions to dismiss and entering judgment thereon, we respectfully request the court to apply to the "pleading" the principles announced in the following decisions.

The District Court for the Northern District of Illinois, Eastern Division, in *United States v. Johns-Manville*, 1 F. R. D. 548, states the purpose of and comments upon, Rule 8(a) of the Rules of Civil Procedure as follows (Opinion p. 550):

"It is true that it has been said many times by courts that pleadings should contain statements of fact and not the conclusions of the pleader. It has also been said that the pleader should set forth ultimate facts and not evidence, *but where the line may be drawn between an 'ultimate' fact and a 'conclusion of the pleader' is something the courts have never been able to say.* The object of the pleading is to give the opposite party *notice of the claim* that will be made against him or the defense that will be interposed. Rule 8(a) of the Rules of Civil Procedure, 28 U. S. C. A., following Sec. 723(c), provides that the complaint shall contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Forms are next to the Rules, among them forms of complaint that are undoubtedly intended to illustrate the manner in which the charge of the plaintiff should be set out. *In those forms provision is not made for setting out in detail the acts complained of but merely what counsel for defense would undoubtedly call 'mere conclusions of the pleader.'*"

Again, in *C. F. Simonin's Sons, Inc. v. American Can Company*, the District Court for the Eastern District of Pennsylvania, 30 F. Supp. 901, at pages 902 and 903, considers the new rules of pleading as follows:

"Under the new rules, 28 U. S. C. A., following Sec. 723c, it is no longer proper to state evidentiary facts in the complaint. Rule 8(a) prescribes merely a short and plain statement of the claim, showing that the plaintiff is entitled to relief; Rule 8(e) (1) that each averment of a pleading shall be simple, concise, and direct; and Rule 12(b) (6) that the sufficiency of the complaint may be raised by a motion based upon 'failure to state a claim upon which relief can be granted.' *In all these provisions the word 'facts' is rather conspicuously absent, and there can be very little doubt, whatever the prior practice may have been, there is no longer any necessity to state such facts as have been described as 'evidentiary' as distinguished from 'ultimate', nor is it good practice.*"

In the case of *Van Dyke v. Broadhurst*, 28 F. Supp. 737, the sufficiency of a pleading, under the Rules of Civil Procedure, was considered upon the plaintiff's motion to require the defendant to set forth certain particulars in his counter-claim.

The court, in denying the motion, comments as follows (Opinion p. 740):

"This court has had occasion to state in former opinions its position with regard to the sufficiency of pleadings. Under the present liberal construction of the Rules of Civil Procedure, to avoid dismissal for failure to state a claim upon which relief may be had, *it is necessary only to allege sufficient facts*

to apprise the opposing party of the nature of the claim which will be proved. Technicalities in pleading are no longer observed. One of the principal reasons for this liberal construction is that the Rules of Civil Procedure provide ample means of discovery and methods of compelling the pleader to disclose to the fullest extent the facts upon which he bases his cause of action."

In *MacLeod v. Cohen-Ehrichs Corporation*, 28 F. Supp. 103, the defendant claimed that the plaintiff's complaint failed to state a cause of action on account of being based upon conclusions rather than facts. In considering this question the court states (Opinion p. 105):

"The requirements of a pleading are substantially set forth in Rules 8(a) and (1-3); (e) (1, 2), and 9(b), Federal Rules of Civil Procedure.

"Equity Rule 25, 28 U. S. C. A. following Section 723, required: 'a short and simple statement of the ultimate facts upon which plaintiff asks relief, omitting any mere statement of evidence.'

"In speaking of the change effected by the new rules, Moore says in his *Federal Practice*, Vol. 1, page 553, '*The Federal Courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence, or law.*'

"Judged by these standards, the complaint appears to be sufficiently definite to give fair notice to the defendant. . . ."

In *Pearson v. Hershey Creamery Company*, 30 F. Supp. 82, the defendants moved for a more definite statement or a bill of particulars.

As the objections to the pleading, in the above case, are similar in principle, and in other respects to the grounds announced by the District Court in granting the motions to dismiss in the case at bar, we take the liberty of setting forth the entire opinion of the court.

“The complaint alleges the formation of a contract between the Plaintiff and Defendant whereby the Plaintiff was to make an audit and survey of the Defendant’s stores and plants. The Plaintiff was authorized to obtain refunds of overpayments made by Defendant to Utility companies. As compensation for these services, the Plaintiff was to receive one-half of all refunds obtained and one-half of all savings effected by Plaintiff’s survey and audit for a period of three years from the dates of the new billings. The plaintiff alleged that he had secured certain refunds and that savings in stated amounts had been effected by virtue of the audit and survey. This action was brought to recover one-half of these refunds and savings. *The Defendant requests, in its motion, that the Plaintiff file a more definite statement or bill of particulars containing the names of the officers of the Defendant to whom the Plaintiff made his recommendations, the specific recommendations made, the approximate date the recommendations were made; whether the recommendations were written or oral, whether they were adopted by the Defendant, the effect of the adoption of the recommendations on Defendant’s utility bills and the utility companies involved, and the method or manner in which the Plaintiff computed the savings he had effected.*

“There are certain additional requests addressed to particular allegations in the complaint but not common to all and not listed here. The Plaintiff’s survey and audit covered more than two hundred stores and plants of the Defendant. It is clear, therefore, that if the Plaintiff complied with Defendant’s motion, the complaint would consist of several hundred pages of detailed allegations. *Such a pleading is not contemplated by the rules of civil procedure, which require that the complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief.* E. I. Du Pont De Nemours & Co. v. Dupont Textile Mills, Inc., D. C., 26 F. Supp. 236. Motions filed under Rule 12(e), Rules of Civil Procedure, 28 U. S. C. A. following section 723c, will be granted only where their object is to amplify pleadings which are so insufficient that either an answer cannot be prepared in response thereto or the Defendant cannot prepare for trial. If these conditions do not exist, the motion will be refused *regardless of the rules and decisions relating to similar motions under the practice existing prior to the present rules of civil procedure.* Bills of particulars or more definite statements are no longer necessary to prevent surprise at the trial nor are they necessary to limit or define the issues. The methods for discovery available to parties under the present rules place the pleader’s information almost entirely within the control of opposing parties. Surprise at the trial has now become almost impossible where careful use is made of Rules 35 to 37. Furthermore, the pre-trial conferences, which are still in their infancy, have met with considerable success in this Court and it is confidently expected that these conferences will reduce the issues at trial to their barest minimum.

“The complaint in the present case is sufficiently definite for the purpose of framing an answer. It is also sufficiently definite to enable the Defendant to prepare, in a general way, for trial. Therefore, the motion must be denied.”

Comment.

The conclusion of the District Court contained in Point I directed to Paragraphs XXVI to XXIX, inclusive, of the “pleading” [Tr. pp. 163 to 169] concerning the “Bancitaly Corporation” transaction, are followed by certain observations of the court, which in our opinion are not justified and do not constitute a proper ground for a dismissal of the action. The remarks of the court are as follows [Tr. pp. 337, 338]:

“What, if anything, the defendants, other than the three last above named, or any of these forty-four other persons had to do with the making of said salary agreement, in what particulars the acts of those defendants and the forty-four other persons who were directors of Transamerica at the time the latter assumed liability under said salary agreement constituted fraud or other wrongful conduct, whether plaintiff claims that all of the defendants and all of said forty-four other persons knew about the credit entries made between April 5, 1929 and the end of that year in favor of defendants A. P. Giannini, L. M. Giannini and V. D. Giannini (now deceased), were false and fraudulent or fictitious, or whether plaintiff seeks to charge that because some of the defendants and other persons possessed such knowledge, particularly those who knew of these book entries or at least attended meetings of the board of directors of Transamerica during the period last mentioned, therefore all of

the defendants and all of said forty-four persons *may be charged as a matter of law with having caused such entries to be made upon the books of said corporation, its subsidiaries, etc., the complaint fails to disclose. Instead, much is left to conjecture.*

“The foregoing series of alleged wrongs may be described as having stemmed from or as being in some way connected with the alleged fraudulent salary agreement. It will also be observed that many alleged wrongful acts are charged in language rather general though sweeping in character.

“Likewise it is claimed that these alleged wrongs were perpetrated over a period comprising many years, during which not only one or another of several different boards, of directors of Transamerica presumptively controlled the management of that corporation *but in addition what might be termed to primary wrong in this particular series appears to have been committed by the management of a different and earlier corporation, with which virtually all but very few of the defendants had nothing to do.*”

If one were to assume that the foregoing remarks of the District Court were sufficient to justify the granting of “motions to dismiss,” the fact remains that the “pleading” and the new rules clearly answer all of the court’s observations. The story in this respect, as told by the “pleading,” is a simple one. It is not claimed that any of the appellees, other than Amadeo P. Giannini, P. C. Hale, James A. Bacigalupi, L. M. Giannini and Virgil D. Giannini (now deceased) had anything to do with the *original making* of the “salary agreement.” The wrong of *all* appellees was in causing the “defendant

corporation” to *assume* the pretended obligations thereof. Such act constitutes one of the “particulars” of the fraud as the “salary agreement” and the “credit entries” were by them, known to have been used for the purpose of making private gain by computing the amount due, according to the terms of the contract, *upon false, fictitious, unearned and unrealized profits and entering the amounts as “credit entries.”*

After such “salary agreement” and “credit entries” had been so set up on the books of “Bancitaly Corporation” *all* the appellees caused the defendant corporation to *assume such obligations*, knowing that the contract had been so used, and thereafter *continued to use* the same as an instrument to pluck the funds of the “defendant corporation” and did thereafter, at various times, *compute* the net earnings of the “defendant corporation” upon false, fictitious, unearned and unrealized profits, *pass the items* thereof to the books of the “defendant corporation” as additional “credit entries” and from time to time *disbursed* the same to some of the conspiring appellees.

It occurs to us that this clearly announces the particular acts constituting the wrong or fraud with which the appellees are charged. The “pleading” alleges that *all the appellees* committed such acts. This charge, whether it be established upon the trial as a matter of law or one of fact, remains, for the purpose of the motions to dismiss, *a present established fact.*

In other words, some of the “conspiring appellees” originated and used the “salary agreement” to obtain the funds of the “Bancitaly corporation” by computing its net earnings upon false, unearned and unrealized profits and by passing the items thereof to its books of account

as “credit entries” and thereafter *all of the conspiring appellees knowingly* caused the “defendant corporation” to assume such “salary agreement” and “credit entries” and continued the same “scheme of operation” against the funds of the “defendant corporation.”

The “pleading” informs the appellees that when they caused the defendant corporation to assume the “salary agreement” and the “credit entries” of the Bancitaly corporation they all knew of its prior fraudulent use in the manner stated. Whether their knowledge was actual or implied *is not a matter of pleading.*

In further replying to the court’s observations, we deem it proper to point out that directors and officers of a corporation may also be “conspirators” and if so, *they are liable in the same sense and to the same extent as other conspiring individuals* and remain so until a legal and sufficient withdrawal from the conspiracy is established. *This does not appear upon the face of the “pleading.”*

The “conclusion” of the District Court contained in Point III, also concerning the form of the language used [Tr. p. 353], and appears to be directed to the pleading as a whole. It gives no guide whatsoever as to its application as a ground for granting appellees’ motions to dismiss.

In erroneously imposing “uncertainty” and “indefiniteness” to the language of the “pleading” the court in referring to the “Bankitaly Mortgage Company—Pacific Coast Mortgage Company transactions” contained in

Paragraphs XXXIV to XXXVI of the pleading [Tr. pp. 173 to 177, inclusive], states as follows [Tr. p. 341]:

“Here it should be pointed out that the allegations embraced within paragraphs XXXIV to XXXVI are so phrased as to leave uncertain whether plaintiff claims that the total of all the advances made from the funds of Transamerica with respect to the so-called Pacific Coast Mortgage Company dealings amounted to the sum of \$1,500,000 or the sum of \$3,000,000.”

A mere reading of said Paragraph XXXV discloses that \$1,500,000 of the funds of the “defendant corporation” *were used to acquire the controlling interest in the capital stock of the “Bankitaly Mortgage Company” and an additional \$1,500,000 of defendant corporation’s funds was transferred to the treasury of the “Bankitaly Mortgage Company” to be used as capital.* We submit that the court’s remarks are unjustified.

In referring to Paragraph XXXVII and XXXVIII of the “pleading” relating to the stock speculations through the Smith-Mallory trust syndicate and the secret profits derived therefrom, the District Court likewise announced its conclusion as follows [Tr. p. 342]:

“Here likewise the pleading is indefinite, that is, it is not clear whether plaintiff contends that the aforementioned profits were divided among the particular three or four persons who are repeatedly singled out in the complaint or that such profits were distributed among all of the defendants and all said forty-four other persons.”

Here again a mere reading of said Paragraph XXXVIII [Tr. p. 180] of the "pleading" clearly indicates that the trust syndicate disbursed the \$300,000 in secret profits *to all the conspirators*. They are mentioned as the "defendants and persons."

The District Court in support of its "conclusion" that the appellant's pleading did not allege fraud with sufficient particularity, made the following remarkable observation, to-wit [Tr. pp. 345 to 347]:

"A pleading must be construed most strongly against the pleader. The presumption is that the latter has stated his cause as strongly as the facts warrant. In view of plaintiff's admission to the effect that at all times since April 27, 1939, she had continued diligently to investigate to ascertain the truth concerning the conduct of the defendants and the other directors with respect to their management and operation of the business of Transamerica, and that although she had been so engaged for a period of approximately two and a half years, nevertheless, she had been unable to complete such investigation and was still carrying on the same at the time of filing her last amended complaint, there arises at least the inference that when she does conclude such inquiry plaintiff may discover one or more of her charges to be unsupported by the facts.

The accusations made herein are of a most serious nature. The period of time involved extends over a great many years. The good name of an exceedingly large number of individuals is under attack. Prior

to the filing of the present suit two of the allegedly chief conspirators had died. Their legal representatives are included among the eighty-one defendants. Since the filing of the second amended complaint one of the defendants also has died. So far as the pleading discloses only four of the present defendants are residents of this district. Where the remaining individual defendants reside, or *from what distances they may be required to travel in order to attend the trial of this cause*, does not appear, except that they reside in California. The principal office and place of business of Transamerica are alleged to be in the City and County of San Francisco, namely, in the Northern District of this State. For aught that now appears the meetings of its directors have taken place in the latter district. *Doubtless many corporate records, more or less voluminous, will need to be transported from the corporation's principal office for the purpose of the trial.* The plaintiff herself claims to be a resident of the State of New York. *Just why this litigation should have been filed in this District is not clear.*

Under these circumstances before the defendants are subjected to the burdens, financial and otherwise, which a trial of the charges aforementioned would impose, they are entitled to be apprised with reasonable definiteness, both as to what it is claimed was their specific participation in the acts complained of, also wherein it is asserted their particular conduct constituted a violation of plaintiff's rights. In any event, plaintiff's admission as above stated to the

effect that she is still endeavoring to ascertain the truth of the charges she has made herein furnishes *a most convincing ground for applying strongly against the pleader* the rule that in all averments of fraud the circumstances constituting the fraud shall be stated with particularity."

As we understand the present rule a pleading is no longer construed most strongly against the pleader. He is not "parsed" out of court by adverse presumptions and inferences.

DeLoach v. Crowley's, 128 F. (2d) 378, 380.

The period of time involved does not extend over a great many years when compared with the magnitude of the wrong and the sacredness of the violated trust.

The court's reason for assuming the good name of the appellees or any of the them, upon the hearing of the motion, is to us, most unusual and difficult to understand. It appears to be directed to the *merits of the case upon a trial* where the issue of "purpose and intent" of the appellees has been considered. Just why the court, in passing upon these motions to dismiss, is solicitous regarding the distance which the appellees or some of them may be obliged to travel to attend the trial, leaves us somewhat confused; as does the court's apprehension that it will be necessary to transport voluminous corporate records from the corporation's principal office to the place of trial. We are likewise unable to reply to the court's criticism of the action being filed and prosecuted in this district, nor are

we able to understand the *astounding statement* that the appellees are entitled to a more definite statement because a trial will subject them to financial and other burdens. It would seem to us that the pleading should be construed as to do substantial justice (Subdivision F, Rule 8, FRCP), and in doing that, especially upon a hearing involving questions of law only, the financial and other burdens of the litigation are irrelevant.

We also direct attention to that part of the District Court's criticism of the "pleading" where, after mentioning the appellant's allegations concerning her "continuing investigation" to ascertain the facts, the District Court states: [Tr. p. 345]

"there arises at least the inference that when she does conclude such inquiry plaintiff may discover one or more of her charges to be unsupported by the facts."

With respect to this ~~fact~~ announcement, we direct the court's attention to the fact that it can be reasonably assumed, *from the investigation*, made by the appellant *after* discovering the Securities & Exchange Commission proceeding, which aroused her suspicion regarding the management of the affairs of the "defendant corporation," and up to and including the filing of her "pleading," *she discovered the very facts and circumstances related in the "pleading."*

We submit that the pleading should be construed to do substantial justice and not interpreted by unwarranted presumptions or inferences against the appellant.

Nowhere does the court in any manner refer to the new concept of pleading; nor to the decisions which interpret and illustrate the same. It is not indicated that the pleading is insufficient to notify the appellees of the "grievance" with which they are charged, nor wherein they are unable to frame a responsive pleading. The conclusions and remarks of the court, used as a basis for granting the "motion to dismiss," urge upon us a conviction that the court did not consider the appellant's "claim" in its true sense, but on the other hand has destroyed it by mere legalistic construction.

The language of appellant's pleading is indeed plain, simple, clear and concise. It may contain some repetition and some surplusage but there is not a sentence nor a paragraph within its scope that appellees may, without hazard admit, deny, explain or modify. We have made an exceptional effort to comply with the present rules of pleading believing they mean just what they say.

PART TWO.

Relating to Point II [Tr. 492], Specifications (a) to (d) (Br. pp. 36-37), Point IV [Tr. 493], Specifications (a) to (c) (Br. pp. 38-39), Point V [Tr. 493], Specifications (b), (e) and (f) (Br. pp. 39-40), Point VI [Tr. 493, 494], Specifications (b), (e) and (f) (Br. p. 41), Point VII [Tr. 494], Specifications (b), (e) and (f) (Br. p. 42).

Note:

1. The foregoing "specifications," made under the points above designated, each refer to the error of the District Court in applying, from the face of the "pleading," the Statute of Limitations and the doctrine of laches as a bar to the prosecution of appellant's action. We have therefore grouped the same for the purpose of discussion.

2. We present our views in light of the new rules of pleading, namely, Subdivision (c) of Rule 8 and Subdivision (b) of Rule 12 and direct attention to the decisions, both before and after the effective date thereof.

Michoud v. Girod, 45 U. S. 502, is a case of *actual* fraud committed by trustees of real estate. A bill filed *thirty-six years* after the commission of the fraud was held not to have been too late. In this case, a purchase by an executor through a third person of the property of the testator was held to be fraudulent and void. The sale was a public auction judicially ordered and the result of the evidence was that a fair price was paid.

Mr. Justice Wayne, in delivering the opinion of the court (p. 560):

“In a case of *actual* fraud, courts of equity give relief after a long lapse of time, much longer than has passed since the executors, in this instance, purchased their testator’s estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief . . . *there is no rule in equity which excludes the consideration of circumstances*, and, in a case of *actual* fraud, we believe no case can be found in the books, in which a court of equity has refused to give relief within the life time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered, or becomes known to the party whose rights are affected by it.”

In considering the plea of laches in the foregoing case, the court first ascertained, *from all of the circumstances of the case, the situation with which the plaintiffs were confronted* and as a predicate for its announcement of the law as above set forth, states (Opinion pp. 559, 560):

“Nor do we think that the complainants have lost their rights by negligence, or by the lapse of time. We can only see in their conduct the fears and forbearance of dependent relatives, far distant from the scene of the transaction of which they complain, desirous of having what was due to them, and suspecting it had been withheld, but unwilling to believe that they had been wronged by brothers, with whom they had been associated in a common interest by another brother who was dead.”

In the case of *McIntire v. Pryor*, 173 U. S. 38, the bill was filed *nine years and four months* after the commission of the fraud and the court in determining the issue of laches on the allegations and proof states (Opinion pp. 53, 54):

“The bill was filed October 21, 1899, a delay of nine years and four months. Upon the theory of the plaintiff, however,—*and it is upon her allegations and proofs* that the question of laches must be determined, * * * we have a right to consider in this connection that the plaintiff is an ignorant colored woman; that she has been wheedled out of her property by an *audacious* fraud, committed by one in whom she placed *entire confidence* and who assumed to act as her agent, that this agent procured the title to the property to be taken in his own interest for little more than a nominal sum by the false personation of Emma Taylor; that the property is still controlled and probably owned by himself; that the position of the property and of the parties to this suit has not materially changed during the time the plaintiff has been in default, nor the property shown to have been rapidly risen in value, and that the rights of no *bona fide* purchaser have intervened.”

and at the conclusion of the opinion (p. 59), further states:

“The *circumstances* of this case are so peculiar; *the fraud so glaring*; the original and persistent intention of McIntire through so many years to make himself the owner of the property, so manifest; *the utter disregard* shown of the rights of the plaintiff, as well as of Jenison, the mortgagee, upon whose

ignorance in the one case and whose confidence in the other he imposed so successfully; the false personation of Emma Taylor, *and the fact that the decree in favor of the plaintiff can do no possible harm to an innocent person*, demand of us an affirmance of the action of the court of appeals. Its decree is accordingly.”

The case of *Baker, et al. v. Scofield*, 221 Fed. 322 [9 Cir.], is a suit by the receiver of a national bank to recover real estate fraudulently transferred by a former receiver to a secret trust for himself. At the time the suit was instituted the former receiver was still the owner of the property and had been for four years, but the title had never been in his name *and his connection with it had been concealed*. The doctrine of this case is based upon *Michaud v. Girod, infra*, 45 U. S. 502, and has never been questioned, altered or modified. We quote liberally therefrom with respect to that portion of the opinion where the defendants’ plea of laches is denied, as follows (Opinion p. 334):

“In answer to the contention of the defendants that the present suit is barred by laches, little need be said. We have searched the record in vain for *testimony*, even of the slightest, tending in the remotest degree to show either actual knowledge, or any channel leading to knowledge, on the part of the plaintiff, or his predecessors in office, or the Comptroller of the Currency of the United States, respecting the purchase by Baker of the contract covering the tidelands during the term of his receivership. During Baker’s *fourteen years* ownership of this

property never once has it appeared in his name. Although Baker himself testified that, when he negotiated with Simpson for the transfer of the legal title to the contract of purchase, to himself, all outstanding claims against him had been satisfied and he was practically out of debt, nevertheless the title to the contract was placed in the name of Norton, his New York attorney, where it remained until the organization of the Seattle Water Front Realty Company. Although the owner of practically all of the stock of that company from the date of its organization down to the present time, Baker has never appeared in any of its activities as an officer thereof, or in any other capacity. *Every avenue by which the transactions affecting the transfer of real property generally become known in the business world has been guardedly closed; every act tending to show the relationship of Baker to the tidelands has been zealously guarded.*

In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, ought not to exclude relief.' * * * Still, within what time a constructive trust will be barred must depend *upon the circumstances of the case.*"

Note:

The substantial facts with respect to concealment which existed in the above case are parallel with the fraudulent concealment in the present action, and the principles and doctrine applied by the court are likewise applicable. There has never been any change in the basic law with respect to fraudulent concealment.

In the case of *Felix v. Patrick*, 145 U. S. 317, where a bill was filed, after a lapse of *twenty-eight years*, to impeach a title fraudulently acquired, the court in limiting the relief granted the plaintiff states (Opinion p. 334):

“The law pronounces the transaction a fraud upon her, but it lacks the element of wickedness necessary to constitute moral turpitude. *If there had been a deliberate attempt on his part by knavish practices to beguile or wheedle her out of these lands, we should have been strongly inclined to afford the plaintiffs relief at any time during the life of either of the parties*; but, as the case stands at present, justice requires only what the law, in the absence of the statutory limitations would demand—the repayment of the value of the scrip with legal interest thereon.”

Note:

In the foregoing case the court makes it clear that the *nature and character* of the fraud practiced and the *degree of wickedness* involved on the part of the defendants is one of the governing elements in determining an issue of laches. It is obvious that in the present action such a question cannot be ascertained without resort to trial upon the merits.

It is an established rule of equity as administered in the courts of the United States that where relief is asked on the ground of *actual* fraud especially if such fraud has been *concealed*, time will not run in favor of the defendant until the discovery of the fraud or until, with reasonable diligence it might have been discovered. *Lopez v. Geantier*, 41 Fed. (2d) 914, 916 [1 Cir.]

Note:

The above action is a suit for an accounting by a guardian for alleged breach of trust and fraud. The defendant claimed that the action was barred by a four year statute of limitations but the court held that such statute of limitations was not applicable to a case of *concealed fraud*. The decision in such respect is based upon *McIntire v. Pryor* and *Michaud v. Girod, supra*.

The case of *Richardson Brothers v. Blue Grass Mining Company, et al.*, 29 Fed. Supp. 658, is a derivative shareholders' suit to enforce corporate rights and recover corporate assets from individual defendants because of alleged misconduct and breaches of trust. In denying the defendants' plea of laches, the court states (Opinion pp. 665, 666):

"Mere lapse of time, however, is not the only element to be considered in applying the rule. *A more important consideration is whether delay in asserting the claim has worked such prejudice or disadvantage to parties adversely interested or such changed conditions which occurred in the meantime that enforcement of the claim is rendered inequitable.* There is no fixed rule by which to measure the *degree* of laches which is sufficient to bar the enforcement of a right. *Each case must be determined according to its own particular facts and circumstances.* * * * Where the parties sustained a confidential relation to each other, and the claim arises from an alleged breach of trust, or fraud is imputed, in the interest of justice *a court of equity will look upon delay with much more indulgence.* * * * It is sufficient to

say that in the light of the facts disclosed by this record, it does not appear that complainants have been guilty of unreasonable delay or that defendants have suffered such prejudice or disadvantage on account thereof as to make enforcement of the demand inequitable. The defense of laches is without merit.”

In *Terry, et ai. v. Prairie Oil & Gas Company*, 83 Fed. (2d) 843 [5 Cir.], the action was instituted to recover the title and possession of land from certain defendants and to require the Prairie Oil & Gas Company to account for royalties under a lease upon such land which was executed *more than five years prior to the suit*. The Prairie Oil & Gas Company was not shown to have been guilty of any fraud in procuring its title, nor did it have any knowledge that the defendant from whom it procured title was not the true owner. Certain claims of the defendants with respect to their interest in the surface estate of the property were denied by the District Court as barred by laches. In reversing this part of the decision, the court states as follows (Opinion pp. 486, 487):

“It is fundamental that the plea of laches is not controlled by limitation or mere passage of time and always presents a question of fact. In this case, the finding of the District Court was that Thomas J. Terry and Samuel G. Terry ‘have for a long time had such knowledge with reference to the subject matter involved and of the court proceedings had in this case as to be barred by laches from prosecuting his suit.’ And that is all. It must be remembered that Diana Shaw was guilty of *actual* fraud in procuring the judgment relied upon to divest appellants of their title. * * * There is no

doubt that the title to $\frac{1}{2}$ of the land recovered by Diana Shaw by the judgment in suit No. 150 remained in appellants. In *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, at page 38, 21 S. Ct. 7, 14, 45 L. Ed. 60, it was said 'in cases of actual fraud, as we have repeatedly held * * * the plea of laches has but an imperfect application.' And again '*in a case of an active and continuing fraud like this, we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence.*' The findings of the District Court go no further than to hold that Thomas J. Terry and Samuel G. Terry had knowledge of the adverse claim of Diana Shaw *and cannot be extended by implication to a finding that they had consented or acquiesced therein*, the plea of laches is not sustained by the record."

The case of *Stanwood, et al. v. Wishard, et al.*, 134 Fed. 959, is a creditor's suit which charges a conspiracy against defendants with respect to certain real estate belonging to a corporation of which plaintiffs were creditors. It was alleged in the bill that the defendant Wishard was the attorney for the plaintiff and as such employed to collect a claim against a debtor corporation and that in doing so, he acquired title to certain property and held the same and received the rents thereof for *ten years prior to action*. In denying the defendants' claim of laches, the court in arriving at its conclusion states (Opinion pp. 963, 964):

"It does not appear from the lapse of time that the situation of the parties has changed. There is no reason for believing that the property has materially changed in value. From the bill the alleged

fraud is not in doubt. What could the plaintiffs have done at an earlier time? Must they all the time have suspected their attorney of fraud? Is that to be the rule? *They reposed confidence in him.* When did such confidence cease? Was it when they failed to get their money? Must a lawyer, when failing to get results, stand impeached for fraud? If so, then there is no lawyer of high or low station but must go over the dam. In the case at bar, *there is no innocent person to suffer by reason of delay.* The whole case stands precisely as it would have if this suit had been brought the day following the sheriff's deed. In *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, it was held that the fraud was known when it could, by the exercise of diligence, have been known. That was a Statute of Limitations case. But, assuming that the same would be the rule in a case of laches (which is not always so), what diligence could have been used by these plaintiffs? None whatever. Defendants' contention is, in effect, in asking a court to hold that a litigant must first suspect his lawyer of fraud. Then on such suspicion he must travel 1500 miles, and to go work to unearth the fraud of his own lawyer, and then bring his suit, *because of an actual fraud. No such requirements are exacted of anyone, and particularly is this not to be exacted of clients so far distant, some of whom quite likely are not familiar with business affairs.* In *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076, the Supreme Court held that 36 years was not too late to bring an action against an executor who bought in the assets of the estate with which he had been entrusted. And on more than one phase of this case as alleged in the bill—and that is the only case now before the court—what the Supreme Court

held in that case is nothing new, but is well worthy of keeping in mind. The Supreme Court said:

“ ‘The rule in equity is, in every court of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest or not, carries fraud on the face of it,’ and surely an executor is no more subject to the charge of fraud than is an attorney, who is told from the first day he enters law school or law office that he must not and shall not buy property the subject of real or possible litigation by his clients. The case of *McIntire v. Pryor*, 173 U. S. 38, 54, 19 Sup. Ct. 352, 43 L. Ed. 606, collects the cases that conclude all discussion that as against an *actual fraud*, and as against one *perpetrating fraud when acting in a representative and trusting capacity*, the period of the Statute of Limitations is largely if not wholly immaterial, and that a lawyer who buys in property on a paper transaction, paying but nominal sums, receiving such rentals as soon pay for it, when such property was subject to his client’s claims, *commits an actual fraud*, and one which no court will wink at, is too plain for debate. The amended bill charges such a fraud. *The demurrer, for the time being admits them to be true and if not denied, or, if denied, but sustained by the proofs, there can be no other decree but one declaring that Wishard holds the property in trust.* Defendants must answer the amended bill within the time allowed, by the rules, or elect to stand upon their demurrer.”

Relating to the use of a "motion to dismiss" for the presentation of the defense of laches *and the limitation placed thereon*, we further direct the court's attention to the case of *Leimer v. State Mutual Life Assurance Co.* (8 Cir.), 108 Fed. (2d) 302 (Op. p. 305):

"So far as laches is concerned, it has been repeatedly held that mere lapse of time does not constitute laches. It is to be determined by consideration of justice, *and that is dependent upon the circumstances of each particular case.* * * * In order to determine whether the plaintiff's claim was barred by laches, we would have to know more than is disclosed by her amended complaint. *Long before the Rules of Civil Procedure for the District Courts of the United States became effective, this Court has frequently disapproved the practice of attempting to put an end to litigation, believed to be without merit, by dismissing a complaint for insufficiency of statement.* In *Winget v. Rockwood*, 8 Cir., 69 F. 2d, 326, 329, we said: 'a suit should not ordinarily be disposed of on such a motion (a motion to dismiss the bill for want of equity) unless it *clearly* appears from the allegations of the bill that it must ultimately, upon final hearing, be dismissed. *To warrant such dismissal, it should appear from the allegations that a cause of action does not exist, rather than a cause of action has been defectively stated* * * *. *That a rule of procedure should be followed which will be most likely to result in justice between the parties, and, generally speaking, that result is more likely to be attained by leaving the merits of the cause to be disposed of after answer and the submission of proof, than by attempting to deal with the merits on motion to dismiss the bill.*'"

As the substantive law of the State of Delaware is here controlling, with respect to the rights of the parties (*Erie Railroad Company v. Tompkins*, 304 U. S. 64), we refer to the following Delaware decisions concerning the application of the "Statute of Limitations" or the doctrine of "laches" against a shareholder of a corporation.

We cite the case of *Cahall, Receiver v. Lofland*, 12 Del. Chancery 290, at p. 305, which is *a bill for an accounting* to recover against former officers, directors and other monies and property due the corporation, where it is said:

"Throughout the consideration of this case, it must be borne in mind that the directors and officers of a corporation are stewards or *trustees for the stockholders*, and their acts are to be tested as such according to the searching, drastic and far reaching rules of conduct which experience has found to be salutary to protect trust beneficiaries"

and upon such premise the court further states with respect to the subject under discussion, as follows (Opinion p. 319):

"The stockholders have not acquiesced in or ratified any of the acts complained of *and have not been guilty of laches in seeking relief*. The only circumstances alleged to show knowledge by stockholders of the transactions complained of was that the books containing minutes of director's meetings and the accounts of the corporation were present at meetings of the stockholders, and the fact of the appointment by the stockholders of auditors. There was no testimony that audits were made. The presence of the books at the meetings did not justify any inference as to knowledge by the stockholders of their contents, and hence no implications of ratification can be justly as-

serted here. Stockholders have a right to expect the officers of the corporation to be faithful to their trust, *and a stockholder is not chargeable with knowledge merely because he might have ascertained facts by an examination of corporate books.* One cannot ratify that which he does not know. The burden is on him who relies on a ratification to show that it was made with a full knowledge of all material facts. Stockholders cannot be presumed to know facts appearing in the records and books of the corporation. Means of knowledge is not knowledge in such case. As was said in *Camden, etc. Co. v. Lewis*, 101 Me. 78, 102, 63 Atl. 523, 533: 'It is not to be expected, and it is not true generally, that the stockholders in meeting assembled, know what is contained in the records of directors meetings, or in the books of account.' "

The case of *Cahall, Receiver, v. Burbage*, 13 Del. Chancery 299, is also a bill for an accounting for the fraud of a director of a corporation where the fraudulent transaction was a matter of corporate record and with respect to which the court after holding that where there is no actual knowledge of a fraud, equity attributes no laches unless the lack of knowledge is attributable *to the culpable negligence of the defaulted party* and based upon such principle states (Opinion p. 303):

"The failure of stockholders to examine the corporate records and books and thus acquire the knowledge of the wrongful acts of the corporate officers and directors, is not to be attributed to their negligence and they have a right to assume that the officers and directors will be faithful to their trusts."

COMMENT.

From a careful study of the decisions of the Federal Courts, it clearly appears that where an issue of laches is interposed, except in very rare cases entirely foreign to the present action, the elements thereof which the court must *factually* ascertain are inseparable from the merits of the case. The precise extent to which Federal Courts are bound by state statutes of limitations in considering an issue of laches has never been definitely determined. Each of the foregoing statements is especially true in cases involving a "fraudulent concealment" of wrongs in an equitable suit for an accounting against a trustee or other fiduciary.

In the present action the nature and extent of the "fraudulent concealment," as alleged in paragraphs XXIX, XXXIII, XXXV, XXXVI, XXXVII, XL and XLI [Tr. 168, 169, 173, 176, 178, 179, 182, 183] of the "pleading," makes it obvious that such wrongs were beyond discovery by any ordinary person irrespective of any degree of diligence.

The District Court in its "conclusions" failed to comment upon the appellees' "fraudulent concealment" of their wrongful acts and no avenue is suggested through which appellant, by the exercise of reasonable or any degree of diligence, could have ascertained or uncovered such acts or obtained any information with respect thereto, prior to the actual discovery of the "proceeding" before the United States Securities and Exchange Commission.

As announced and considered in the cases heretofore mentioned, the only correct and just manner of determining the issue of "laches," is by a formal plea of the de-

fendants and a full and complete development, by evidence, of all the facts and circumstances of the case.

The elements of laches or the absence thereof call for such an investigation. Except in very rare cases where neglect or lack of diligence is *clearly* apparent upon the face of a complaint, such issue is factual. In the present action, appellant desires the appellees to face a trial upon the merits of the controversy that, among others, the issue of "laches" if properly and sufficiently presented, may be fairly tried and appellants' case not erased by academic interpretation upon "motions to dismiss."

In considering this subject as a whole, we deem it proper to point out that subdivision (c) of Rule 8 expressly provides that "laches" and the "Statute of Limitations" as a defense must affirmatively be set forth in a responsive pleading and subdivision (b) of Rule 12, provides that every defense in law or fact to a claim for relief, shall be asserted in a responsive pleading, except that certain defenses may, at the option of the pleader, be made by motion, but the defense of "laches" and the "*Statute of Limitations*" are each noticeably omitted.

In this regard we direct the Court's attention to the case of *Dirk Ter Haar v. Seaboard Oil Company of Delaware*, 1 F. R. D. 598, where it is stated (Op. p. 598):

"The defense of laches, stale demands and the statute of limitations may not be asserted by motion to dismiss, but should be set forth affirmatively in defendant's answer."

It seems well established that in the Federal courts the State Statutes of Limitations are applied by analogy as laches, *but only where the facts make it inequitable not to*

do so (*Webb v. American Surety Co.*, 88 Fed. Rep. (2d) 171, Op. 175) and that being true the mere lapse of time is only one of the elements to be considered in applying the doctrine. The most important consideration is whether the delay in asserting a claim has worked such disadvantage to parties adversely interested that enforcement of the claim is rendered inequitable. It is obvious from these principles that the defense of "laches" and the Statute of Limitations should only be determined from all the facts and circumstances developed upon a trial.

From the decisions it will also be seen that in cases of *gross actual fraud* the doctrine is not ordinarily applied, *except to protect the rights of innocent third persons* and that in a case of active and continuing fraud the degree of laches should be determined by the proof and to be effective must amount to an assent or acquiescence in the wrong by the plaintiff.

The present action involves the corporate acts of the "defendant corporation" in which the appellees caused them to engage which are preserved in written corporate records which cannot be altered by any of the parties to the action, their personal representatives or lapse of time. It is difficult for us to believe that the death of a wrongdoer who had committed a grievous and continuous wrong, without other accompanying equitable circumstances, is recognized in equity as such a disadvantage as to render the doctrine of laches applicable in an action for an accounting against his estate. Certainly more than this must appear to sustain a "conclusion" that the doctrine is applicable. In many cases, when all the facts are presented, the equities might be on the side of the plaintiff and show that it would be inequitable to apply the doctrine. We

seek the right to make such a showing on behalf of the appellant upon the trial of the present action.

In *Fleishhacker et al. v. Blum et al.*, 109 Fed. (2d) 543, this court decided that the action was not barred by the California Statute of Limitations.

The bank loans which were the basis of the wrong in that case were made on *December 19, 1919 and December 22, 1919*. The wrong involved therein was discovered by the shareholders, only through an independent investigation made, thirteen or fourteen years later. The action was filed on December 5th, 1934, fifteen years later.

In the present action the wrong is a continuing one, commencing on or about October 11, 1921 and continuing until at least August 21, 1942.

In the case at bar the plaintiff stockholders' first discovery of suspicious circumstances with respect to wrong doing by the corporate management was on the 27th day of April, 1939. Her action was filed April 16, 1941 and within the statutory period relating to the discovery of fraud.

In the *Fleishhacker* case, the District Court found that the plaintiff stockholder discovered the fraud within three years prior to the commencement of the action and not sooner. The court determined that the bank did not discover the fraud until the appellee shareholders brought it to light by their investigation which was within the three year period.

It is both interesting and important to note that in the *Fleishhacker* case it was decided that the Bank did know that the loans in question were to be used in a venture in which Fleishhacker obtained a bonus interest, yet one

Burgess, who was an assistant in the note department had been told by one Alexander, the head of his department, that Fleishhacker was a partner in the venture and it also appeared that Mortimer Fleishhacker, J. J. Mack and Sigmund Stern, members of the finance committee which approved the loans, knew that the same were to be used in an enterprise in which Herbert Fleishhacker was interested, but thought that Herbert Fleishhacker was personally investing a like amount of money to match the loans in the enterprise.

By comparing the extent and nature of the knowledge and information available to the Bank in the *Fleishhacker* case regarding the wrong committed with the facts and circumstances set forth in the “pleading” in the present case regarding the “fraudulent concealment” of the wrongs and the lack of knowledge or information of the appellant thereof, we are unable to understand wherein and by what means the District Court could conclude, or the appellees claim, that the “defendant corporation” or the “appellant shareholder” acquired any actual or implied knowledge of the appellees’ wrong prior to appellant’s discovery of the “proceeding” before the United States Securities and Exchange Commission on April 27th, 1939.

We respectfully submit that the bar of the Statute of Limitations does not appear from the face of the pleading, nor does the same show lack of diligence on the part of the appellant in filing her action.

PART THREE.

Relating to Point V [Tr. 493], Specifications (d) and (g) (Br. p. 40), Point VI [Tr. 493, 494], Specifications (d) and (g) (Br. p. 41), Point VII [Tr. 494], Specifications (d) and (g) (Br. p. 42).

Note:

1. The foregoing specifications of error, made under the points above designated, each involve the legal effect, in this action, of the “defendant corporation” transacting its numerous business enterprises through corporate subsidiary departments and instrumentalities.

2. We group these specifications of error for argument to show the error of the court’s “conclusion” requiring appellant to set forth in her “pleading” the part, if any, taken by such corporate subsidiary departments and instrumentalities in the transactions in question.

3. We are unable to determine from the decision of the District Court the precise legal theory upon which its “conclusions” upon this subject justify granting the “motions to dismiss” or the final judgment.

It is our contention that where a parent corporation owns, controls and operates corporate subsidiaries as departments, instrumentalities or agencies for *the conduct of its general business*, the assets and property of such corporate departments are, in equity, the property and assets of the parent corporation, and likewise the losses and debts of such corporate departments are equally the losses and debts of the parent corporation. Independent entities of the corporation departments and agencies are

so far disregarded that each is considered a part of the *individual whole*.

With respect to this point, we direct the court's attention to Paragraph II of the "pleading" [Tr. pp. 144, 145] wherein, among other averments, it is alleged:

"Defendant, Transamerica Corporation, has been at all times since its incorporation, and was at all times herein mentioned, and now is, duly authorized to engage in and engaged in *numerous business enterprises*, including among others a general business involving and devoted to financial, investment, brokerage, insurance, and real estate enterprises, *and also a general business* of organizing, acquiring, holding, owning, controlling, maintaining and operating, other corporations and associations *as its corporate subsidiaries, instrumentalities and departments, in the operation of its said business enterprises*, and including among others, the following corporate subsidiaries, departments and instrumentalities."

With respect to the foregoing averments of the pleading, the District Court states as follows [Tr. pp. 357, 358]:

"The second amended complaint lists twenty-six corporations as subsidiaries of Transamerica. It is there averred that the latter corporation owned, controlled and operated each of these subsidiaries. As heretofore pointed out, plaintiff charges that as the result of a series of various alleged wrongful acts both Transamerica and also in some greater or lesser degree, these numerous subsidiaries sustained substantial losses."

And concludes [Tr. pp. 358, 359]:

“The parties herein sued are entitled to be informed whether plaintiff claims that not only Transamerica but also each and all of these twenty-six subsidiaries, or if only some then which of the latter, acquired all of the capital stock and all of the assets and assumed all of the liabilities of Bancitaly corporation, including the alleged fraudulent salary agreement. Likewise, they ought to be apprised whether she asserts that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, entered upon their books credits and disbursed funds on account of the provisions of said agreement. * * * . In addition they are entitled to be advised whether plaintiff claims that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, participated in the remaining series of alleged wrongful acts, including the so-called Walston and Company transactions, the Pacific Mortgage Company dealings, the so-called Smith and Mallory trust syndicate transactions and the stock market manipulations.”

The following decisions demonstrate the error of the court's conclusions and final judgment upon this subject:

The case of *Kimberly Coal Co. v. Douglas*, 45 Fed. (2d) 25 [6 Cir.], is an appeal from a decision of the District Court refusing to allow, except in a limited amount, a claim filed by the appellant with the appellees as receivers of the Jewett, Bigelow and Brooks Coal Company and the J. B. Stores Company. A prior judgment had been rendered upon the same claim against the Coal Company, *in which litigation the J. B. Stores Company*

was not a party. The court determined that the prior judgment was a bar to the action as against the J. B. Stores Company for the reason that it was merely a subsidiary instrumentality of the Coal Company and had no independent liability. The language of the court is as follows (Opinion p. 27):

“This contention as to the independent liability of the J. B. Stores Company cannot be maintained. If, as is conceded, the J. B. Stores Company was a mere instrumentality used by the Jewett, Bigelow & Brooks Coal Company in the conduct of its business, the property of the Stores Company must in equity be considered the property of the Jewett, Bigelow & Brooks Coal Company and the debts of the subsidiary, the debts of the parent company. The independent entity of the two companies is so far disregarded that each is considered as but a part of the indivisible whole.”

Where the corporate organization and affairs of one railroad company are controlled and dominated by another railroad company through ownership of stock or lease, the roads must be regarded as identical for the purpose of rate making and in this respect the court in *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Association*, 247 U. S. 490, in disposing of the controversy, states (Opinion p. 501):

“While the statements of the law thus relied upon are satisfactory in the connection in which they are used they have been primarily and repeatedly held

not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner *but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies.* * * * In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.”

In the case of *Centmont Corporation v. Marsch*, 68 Fed. (2d) 460 [1 Cir.], the court approves the principle for which we contend and after a careful consideration of many authorities which are named in the decision, states the principle as follows (Opinion p. 464):

“(1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud.

(2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, *as to make it merely an instrumentality or adjunct of another corporation.*

* * *

It is unnecessary to add to the authorities in support of the rule that, where a subsidiary corporation is organized for a special purpose by a corporation

which holds all its capital stock, and dominates and controls its affairs *in carrying out its own business purposes, the subsidiary may be held to be a mere instrumentality for that purpose*, and the court will disregard the corporate form and do justice between the corporation and third parties.”

After the decision in *Kimberly Coal Co. v. Douglas*, *supra*, the same court in *Roof v. Conway*, 133 Fed. (2d) 819, where the precise question, here discussed, was there involved, the court cites numerous supporting decisions and states the doctrine as follows (Opinion pp. 823, 824):

“Insisting that the *res* involved in the pending petitions of appellants before the Public Utilities Commission of Ohio (that is, the certificate of public convenience and necessity issued to the subsidiary corporation) was not as matter of fact in the custody of the appellee *receivers of the corporation which owned the stock of the subsidiary*, appellants contend that the mere exercise of control by one corporation over another, through stock ownership or through identity of stockholders, does not make either corporation the agent of the other, or merge them into one corporation so as to make the contract of one binding upon the other. This proposition is true, with the qualification that ‘the legal fiction of distinct corporate existence will be disregarded *when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted as to make it only an adjunct or instrumentality of an-*

other corporation.' Pittsburgh & Buffalo Co. v. Duncan, 6 Cir., 232 F. 584, 587. * * *.

The holding that the separate entity of a controlled corporation will not be recognized if such recognition would result in injustice, is incontrovertible.

From the opinion in Chicago, Milwaukee & St. Paul Railway Co. v. Minneapolis Civic & Commercial Association, 247 U. S. 490, 500, 501, 38 S. Ct. 553, 557, 62 L. Ed. 1229, it appears that, in the argument of the case, emphasis had been laid upon declaration in various opinions of the Supreme Court that mere ownership by one corporation of the capital stock of another does not create identity of corporate interests, or constitute the stockholding company owner of the property of the subsidiary, or create a relationship of principal and agent. The Supreme Court explained that such statements, while satisfactory in their context, had been repeatedly held *inapplicable* where the resort to stock ownership was not for the purpose of participating in the affairs of a corporation in the normal and usual manner *but for the purpose of controlling a subsidiary company so that it might be used as a mere agency or instrumentality of the owning company.* The pronouncement was made that 'the courts will not permit themselves to be blinded or deceived by mere forms of law but regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as justice of the case may require.'

This court has applied the principle that the property and debts of a subsidiary corporation are to be treated, in equity, as those of the company owning its capital stock, where the subsidiary is used as a mere instrumentality in the conduct of the parent company business. *Kimberly Coal Co. v. Douglas* (6 Cir.), 45 F. (2d) 25. * * * A carefully prepared and well reasoned opinion upon the topic under discussion is *Centmont Corporation v. Marsch*, 1 Cir., 68 F. (2d) 460, 464. There after citing and discussing many cases pertinent to the doctrine, the Court of Appeals for the First Circuit stated: 'It is unnecessary to add to the authorities in support of the rule that where a subsidiary corporation is organized for a special purpose by a corporation which holds all its capital stock, and dominates and controls its affairs *in carrying out its own purposes*, the subsidiary may be held to be a mere instrumentality for that purpose, and *the court will disregard the corporate form, and do justice between the corporation and third parties.*'

Comment.

The appellant's "pleading" makes it clear [Tr. Par. II, p. 144] that the "defendant corporation," at all times mentioned, was engaged in *numerous business enterprises*, some of which are specified, and conducted the same by and through corporate subsidiary departments and instrumentalities.

If it were incumbent upon appellant to first ascertain, and then set forth in her pleading, all of the ramifica-

tions in which the appellees may have used such corporate subsidiary departments and instrumentalities in the accomplishment of the wrongs charged, it is reasonable to assume that such information would not, under the circumstances presented by the "pleading," be made available to appellant.

It can also be well understood that appellant, prior to the filing of her action, would be obliged to resort to litigation to obtain the required information. The circumstances of a case of this character make such requirements unreasonable. We find no decision in support of the views of the District Court. The principles of the decided cases herein mentioned seem to make our position solid.

Upon the authority of such decisions we submit that the "conclusion" of the District Court, that the participation, if any, of the corporate subsidiary departments and instrumentalities of the "defendant corporation" in the wrongs committed by the appellees should be set forth in the "pleading," is erroneous. In no event does such "conclusion" justify the granting of the "motions to dismiss" nor the final "judgment" of dismissal.

PART FOUR.

Relating to Point V [Tr. 493], Specifications (l) and (m) (Br. p. 41), Point VI, [Tr. 493, 494], Specifications (l) and (m) (Br. p. 41), Point VII [Tr. 494], Specifications (l) and (m) (Br. p. 42).

Note:

1. The above specifications of error each involve the proposition that the court erred in granting appellee's motions to dismiss, and entering final judgment of dismissal upon the ground that the appellant's "pleading" contains more than one claim or cause of action and must be divided into separate counts, in order to facilitate a clear presentation of the matters set forth.

2. In this discussion we assume that the court's "conclusions" and other remarks, are intended to mean that the "motions to dismiss" are granted, and the final judgment of dismissal entered, because the appellant included in one statement of claim several independent claims or causes of action. *The District Court did not pass upon a motion to separately state claims.*

3. In presenting our views we also assume that the District Court arrived at its "conclusion", "order" and "judgment" upon the erroneous theory that, as *all* of the corporate acts of the "defendant corporation," involved in the wrongs of the appellees, were not caused by the same Board of Directors, the continuity of the conspiracy was intercepted, and the liability of the members of one Board of Directors legally separated from the acts of the others.

4. Our argument also relates to the error of the court's "inferred conclusion" that a director of a corporation

merely by failing to be reelected thereby effectively withdraws from a *continuing conspiracy* into which he had formerly entered, with all other directors, to use corporate funds and property for private and secret profit.

5. Our point with respect to Notes 3 and 4 is that it takes more than a mere passive position or negative act of a conspirator to effectively “withdraw” from a “continuing conspiracy” in order to avoid liability for future acts of his co-conspirators within the scope of the unlawful agreement.

6. Our remarks also present the point that appellant’s action is a suit for an *accounting* for fraud of trustees *of which equity has sole jurisdiction and that all transactions sought to be included in the accounting, however varied in their nature, constitute but one general claim or cause of action.*

As a basis for our comments, hereinafter made, we cite the following decisions which support and illustrate our point that the “pleading” states but a single claim.

The case of *Bremner v. Leavitt*, 109 Cal. 130, is an action for an *accounting* between partners wherein the trial court sustained demurrers for uncertainty upon the grounds that several causes of action were improperly united *and that the complaint contained several causes of action not separately stated.*

In reversing the order of the trial court, the Supreme Court states (pp. 131-132):

“While they are separate and independent matters in the sense that they are varied and different in character, they are not separate causes of action, *but integral parts of one and the same cause.* Respondents

have very evidently fallen into confusion as to what constitutes a separate cause of action in such a case. It is alleged, for instance, among other matters *for which an accounting is prayed*, that at the time of the formation of the partnership, it was agreed that the same should pay the plaintiff the sum of \$1000, with interest, etc., which has not been paid; that the defendants, Leavitt & Woodson have failed to devote their time and services to said partnership business as agreed, by reasons of which the business of said partnership has suffered loss and damage, and that said defendants have devoted all of their time and energies to other enterprises, in which they have made large profits, for which they should be required to account to said partnership; that the plaintiff has personally paid debts of said partnership, for which he has not been reimbursed, and that he has furnished personal property to said partnership for which he has not been paid. These matters, and others of like nature, are regarded and characterized by respondents as ‘a complete jumble of causes of action.’ *It is perfectly obvious that they do not constitute separate and distinct causes of action. They are proper matters to be alleged as grounds for an accounting between the partners, but they are all parts of the same general subject matter, and constitute but one general cause of complaint.*”

Again at pages 132 and 133, it is further stated:

“Equity does nothing by halves, but gives a full relief in such cases. When it undertakes to adjust the differences between partners, it adjusts them all. ‘The whole subject matter in controversy between the parties, which includes all the partnership transactions of each and all the partners, is the subject of the adjudication, and the account and decree must include all

these matters, and leave nothing open for further litigation or controversy. Equity will not adjudicate causes piecemeal.' (Griggs v. Clark, 23 Cal. 427.) The same general considerations apply to the other matters alleged. *It is not only proper, but necessary, to set forth in such an action, all the transactions of the firm and its members sought to be included in the accounting, however varied in their nature, and, taken as a whole, they go to make up and constitute the plaintiff's cause of action."*

The case of *Vernoia v. Supreme Coal & Ice Corporation*, 290 N. Y. S. 447, is a "derivative action" in equity by a stockholder of a corporation directed against the directors and officers thereof. The decision is enlightening upon the subject here under discussion and we take the liberty of setting forth the entire opinion (pp. 447-448):

"In a derivative action in equity by a stockholder to restrain acts of waste by the directors and officers of a corporation, under an unlawful contract in restraint of trade, and to compel an accounting, etc. orders striking out certain paragraphs of the complaint as irrelevant and prejudiced to the defendants and directing plaintiff to serve an amended complaint separately stating and numbering the causes of action alleged in the complaint, reversed with \$10.00 costs and disbursements, and motions denied, with \$10.00 costs, with leave to answer within ten days from the entry of the order hereon. *In our opinion the complaint sets forth a single cause of action in equity*, brought by a stockholder in behalf of the corporation, to annul an unlawful contract made by certain defendants in restraint of trade, to restrain the purchasers and directors of the corporation from continuing the waste

of the corporation property and funds, pursuant to such unlawful contract, and for an accounting, etc. *The facts alleged in the complaint are all connected and are parts of a single conspiracy to give to defendant Rubel corporation a monopoly and control of the ice business in Brooklyn.* There is not a separate cause of action for damages, for conspiracy and another to restrain the unlawful acts of the defendants, directors and officers of the corporation.”

Lake v. Boston Development Company, 50 Utah 347, is an action by stockholders against a corporation and its officers and directors seeking an accounting and injunctive relief with respect to certain illegal and wrongful acts. The court in holding that the complaint with respect to the rights of the corporation contained but one cause of action, states as follows (Op. p. 356):

“We desire to add that it is not possible to lay down any hard and fast rule regarding what may and what may not be incorporated in one complaint or in a single statement in stockholders’ actions, or in any action, for an accounting, where it is alleged that the corporation officers have been derelict and have mismanaged the corporation’s affairs and have wrongfully appropriated the corporation’s property. In an action for an accounting, wrongful acts, if charged against the same individuals, may, as a rule, be incorporated into one statement in the complaint, regardless of how numerous or how involved the alleged wrongs may be. *Under such circumstances, the wrong consists in appropriating the property or property rights of the corporation, and that wrong constitutes but one cause of action, regardless of the number of acts on the part of the wrongdoer. The*

numerous wrongful acts alleged against Vahrenkamp and the officers and directors in this case, therefore, constitute but one cause of action."

In *Kilbourn v. Sunderland*, 130 U. S. 505 (Op. p. 515), it is said:

"The parties stood in a fiduciary relation toward each other, and, in the course of the transactions between them, from 30 to 40 different lots of ground were bought for the complainants in upwards of 15 distinct purchases. As to 5 of these purchases, fraud is specifically charged. A considerable amount of complainant's money was in defendants' hands, and a counterclaim was set up by them in relation to services performed in and about the care of a portion of the property purchased; services covering many payments for taxes, interest, etc.; making of loans and procuring renewals; receipts for advances. *The transactions were all parts of one general enterprise, and claims of a character involving trust relations.* Before the severance of the connection between the parties, Kilbourn and Latta dissolved, and the amounts due from Kilbourn and Latta, if any, and from Latta alone, if any, to Sunderland and Hillyer or to Sunderland, and the offsets and counterclaims of Kilbourn and Latta or of Latta, *all sprang from one series of operations, and required an accounting on both sides,* and that accounting until disentangled by the investigation of the court, was apparently complicated and difficult, 'there can be no real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law,' 1 Story's Eq. Jur., p. 450; and, as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud

has in equity a more extensive significance than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the Supreme Court of the District in sustaining the jurisdiction."

In support of our claim, that where *all* the directors of a corporation enter into a "continuing conspiracy" to use it for their private gain, the mere fact that some of the directors fail for reelection does not *ipso facto* constitute an effective "withdrawal" or release them from liability for subsequent acts of their co-conspirators pursuant to the same conspiracy, we cite the following decisions.

In determining the essential requirements of "repudiation" or "withdrawal" from a conspiracy, the court in *Hyde v. United States*, 225 U. S. 347 (Op. pp. 369-370), states as follows:

"Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is *different from one that is to be continuous*. If it may continue, it would seem necessarily to follow *the relation of the conspirators to it must continue, being to it during its life as it was to it the moment it was brought into life. If each conspirator was the agent of the others at the later time, he remains an agent during all of the former time*. This view does not, as it is contended, take the defense of the Statute of Limitations from conspiracies. It allows it to all but makes its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a con-

tinuing criminality. *It requires affirmative action, but certainly that is no hardship.* Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, *until he does some act to disavow or defeat the purpose, he is in no situation to claim the delay of the law.* As the offense has not been terminated or accomplished, he is still offending, and we think, *consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence.* The successive overt acts are but *steps* toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the Kissell Case (218 U. S. 601), stated in another way. As he has started evil forces *he must withdraw his support from them or incur the guilt of their continuance.* Until he does withdraw there is *conscious offending* and the principle of the case cited by defendants is satisfied."

The case of *Eldredge v. U. S.*, 62 Fed. (2d) 449, involves a conspiracy to embezzle the funds of a bank. It was necessary to falsify the books each month in order to *conceal* the shortage.

The defense was that the offense was barred by the Statute of Limitations because the defendant Eldredge had withdrawn from the conspiracy three years prior to the last act of embezzlement.

The defendants' withdrawal consisted of a conversation with one of his co-conspirators to the effect that he would no longer participate in or consent to the embezzlement of further sums.

The court determined that the defendant by such conversation did not *effectively withdraw* from the conspiracy, and in so doing, after citing numerous Supreme Court decisions, including *Hyde v. U. S., supra*, states as follows (Op. pp. 451-452):

“We are not persuaded that Eldredge intended to withdraw his assent to *continued concealment* by his associates. But even if he did, it is not enough. A withdrawal from a conspiracy cannot be effected by intent alone; *it must be accompanied by some affirmative action which is effective*. A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set, *he must step on the fuse*. The first abstraction from this bank set in motion a chain of inescapable consequences, if the conspiracy was to succeed. To withdraw, *that chain must be interrupted*; and that is not done by advising his associates to confess. Eldredge must have known that his associates must continue to conceal the shortage, unless they too, were willing to confess and take the consequences. If he had admonished them no longer to falsify the records, which he did not, such admonition would have amounted to no more than a suggestion that all confess their crime; if his associates were not in the mood so to do, such a declaration to them could have been no more than an ineffective gesture.

We hold, therefore, that Eldredge did not manifest an intent, in the conversation with his confederate, that the shortage should be revealed and the crime confessed, but if he did so intend, a manifestation of that laudable purpose to his co-conspirators was not an effective method of disclosure or adequate confession of guilt. * * *

This court in *Buhler v. United States*, 33 Fed. (2d) 382, after mentioning the doctrine of *Hyde v. United States* (*supra*), concerning the elements of a “withdrawal” and “conscious participation,” and citing the case of *Ware v. United States*, 154 Fed. 577 states as follows (Op. p. 384):

“The court did not attempt to lay down any specific rule defining what would be competent or sufficient evidence to establish it. The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character. It might of course be shown by a writing, or by an express oral agreement, and we think by conduct wholly inconsistent with the theory of continuing adherence. *But the mere failure to perform an overt act in furtherance of the conspiracy, or mere inactivity not inconsistent with the theory of continuing adherence would not of itself necessarily import withdrawal.*”

COMMENT.

The “conclusions” and remarks contained in the decision of the District Court, upon this subject are stated as follows [Tr. 353, 354, 355]:

“These alleged wrongs are asserted to have commenced with an allegedly fraudulent transaction entered into during the year 1927, in other words, nearly a decade and a half prior to the filing of the present litigation. During that rather lengthy period there were changes in the management of Transamerica through the election of several different boards of directors. Virtually a majority of those defendants

who have been sued by their true names and who had served as directors had ceased to have any official connection with that corporation during the respective periods when it is asserted that all but one of the transactions complained of were consummated.

While it is averred that, with the exception of a few of the partners of Walston and Company, all of the defendants sued by their true names, together with the forty-four other persons listed, had served at one time or another as directors of Transamerica during most of the period within which the alleged wrongs were committed, nevertheless, it is charged that each of the series of transactions complained of stemmed from some corporate act performed by the particular board of directors acting in that capacity at the specific time involved. In other words, but for some corporate step on the part of those certain defendants who functioned as directors at the particular period involved, none of the alleged wrongful transactions could have been effected.

While plaintiff's counsel have argued that all of the acts complained of constituted but a single conspiracy extending over a period of about fourteen years, *we see no escape from the conclusion that by her pleading plaintiff has sought to charge—as hereinbefore outlined—the commission of several separate and distinct series of wrongs, each disconnected from all the others.* We are not persuaded that the evidence which, for example, might tend to prove the so-called fraudulent salary agreement or the alleged wrongs committed in carrying out the provisions thereof, would have any connection with the evidence pertaining to what has been described as the series of Walston and Company transactions, or would throw any light upon the Pacific Coast Mortgage Company deal-

ings, or would be relevant to what has been referred to as the series of Smith and Mallory trust syndicate transactions, or would have any connection with the operations whereby it is claimed Transamerica sustained large monetary losses as the result of engaging in stock market manipulations.

Furthermore, we do not perceive upon what legal theory it may be held that under the facts alleged any one of the aforementioned series of transactions constituted a part of or was bound up with any one or more of the remainder. Nor has any case been cited which would support plaintiff's contention to the effect that alleged wrongful acts, done by certain individuals while carrying out their functions as directors of a corporation, may be charged against others who neither were directors at the time such corporate steps were taken nor were otherwise engaged in the specific transaction involved.

Hence we conclude that each claim founded upon a separate transaction, as herein before outlined, should have been stated in a separate count, and that such separation would have facilitated the clear presentation of the matters set forth. (See Rule 10b, FRCP.)"

It is apparent from the foregoing that *the true sense of appellant's action* has been erroneously disregarded. The wrong consists of secret profits and corporate losses occasioned thereby. The relief requires an accounting in equity to determine the precise extent of recovery.

The District Court obviously confused the “thing amiss” with the several means with which it was accomplished. Merely because delinquent trustees use several methods or means to accomplish a common design, with respect to trust property, does not, for the purpose of suit, divide their general wrong into separate claims, or causes of action.

The court’s conclusions, order and judgment are evidently based upon the erroneous theory that a director of a corporation, who merely fails for reelection, *ipso facto* effectively withdraws from an existing “continuing conspiracy” to use the corporation for private gain and, therefore, wrongs subsequently committed by his co-conspirators, to effect the common design, are not chargeable to him. This view is entirely foreign to the law and the plain import of the pleading. One can be a member of a “continuing conspiracy” with respect to corporate action without being a director and he may continue to be a conspirator after his power to commit a corporate act is taken from him. The decisions heretofore set forth demonstrate the correctness of our position. Here again the District Court, through legalistic construction, has seen several claims where but one exists.

The case of *Bowman v. Wohlke*, 166 Cal. 121, cited by the District Court in support of its “conclusion” [Tr. 355], is strictly a common law action. It is an action to recover damages for malicious prosecution, slander and trespass. It was demurrable by reason of California Code

of Civil Procedure, Section 427. It is clearly distinguished from the present case. In the appellant's action she appeals to equity to judicially establish a trust relationship and decree that appellees *account* for their derelictions and that the extent thereof be determined and judgment entered accordingly.

We submit that the decisions heretofore cited sufficiently demonstrate that the several transactions mentioned in the "pleading" are proper grounds for an accounting, that they are all parts of the same general subject matter and constitute but one general cause of complaint. We believe that it is not only proper but necessary to set forth all transactions to be included in the accounting in a single claim no matter how varied in their nature they may be.

We also urge, from the cases cited, that a conspiring director, who is a member of a continuing conspiracy, must do something more to effectively withdraw from such conspiracy than merely fail of reelection. The authorities mentioned show that an effective "withdrawal" can only be accomplished by *affirmative acts*, in good faith, evidencing a repudiation and abandonment of a continued participation in a conspiracy which he has placed in motion or otherwise aided.

We feel the propriety of directing attention to that part of the District Court's remarks [Tr. 354, 355] where reference is made to the *evidence* which the court *pre-determines* could not or might not be sufficient to connect the appellees' several wrongful transactions. In the light

of the *admitted facts* set forth in the “pleading” we are unable to perceive the materiality of the court’s remarks concerning the persuasive force of the evidence which appellant may offer upon a trial.

In closing this subject permit us to suggest that the present rule of pleading (10(b), F. R. C. P.), with regard to stating claims in separate counts appears to be applicable only, where such a separation facilitates a clear presentation of the matter set forth. It occurs to us that, even upon a motion for a separate statement of claims, it could be an abuse of discretion to order separate counts where, as here, the “pleadings” is orderly, sequential, and each paragraph complete in itself. It seems certain that none of the appellees can experience any difficulty whatsoever in determining and segregating the particular paragraphs of the pleading to which they wish their answer to respond.

PART FIVE.

Relating to Point V [Tr. 493], Specifications (h) and (i) (Br. p. 40), Point VI, [Tr. 493, 494], Specifications (h) and (i) (Br. p. 41), Point VII [Tr. 494], Specifications (h) and (i) (Br. p. 42).

Note:

1. By this discussion we urge that the District Court committed reversible error in receiving and considering evidence upon the hearing of the appellees' "motions to dismiss" and in failing to accept as true the averments of the "pleading."

In support of our points here discussed, we call attention to the following authorities:

In *Ansehl v. Puritan Pharmaceutical Co., et al.*, 61 F. (2d) 131 (8 Cir.), (Op. p. 133), it is said:

" . . . since such a motion to dismiss has taken the place of a demurrer, it is elementary that it *admits of material facts well pleaded in the complaint*, that only defenses in point of law appearing upon the face of the complaint may be considered and that unless it is clear that, *taking the allegations to be true*, no cause of action in equity is stated, the motion should be denied."

In *Stromberg Motor Devices Co. v. Holley Bros. Co., et al.*, 260 F. 220 (pp. 221-222), the rule is stated as follows:

"It is elementary that on such a motion the allegations of material facts which are well pleaded in the bill must be *accepted as true* for the purpose of the motion, and that only defenses in point of law arising upon the face of the bill may be raised in this manner

and called up and disposed of by the court before final hearing.”

The decision of *Edwards v. Bodkin*, 249 F. 562 (p. 564) (9 Cir.), states the principle as follows:

“The motion admitted the truth of the material allegations of the complaint, *and we must now read them as established facts* and determine whether or not they state a cause of action calling for equitable relief.”

In *Vitagraph Inc., et al. v. Grobaski, et al.*, 46 F. (2d) 813, it is said at page 814:

“The practice which prevails in the Federal Courts in disposing of motions to dismiss is to overrule the motion and to allow the case to go to hearing *unless it is made absolutely clear that taking all the allegations of the bill of complaint to be true it must be dismissed at the hearing. The court should not attempt to determine doubtful questions as upon final hearing.* Ultimate rights should be decided only when the court is in possession of the materials necessary to enable it to do full and complete justice between the parties.”

In *Ralston Steel Car Co. v. National Dump Car Co.*, 222 Fed. 590, at p. 592, the rule is stated as follows:

“Under our practice, the federal courts are inclined to allow a case in equity involving important matters to go to issue and proofs, where a doubtful question is raised by the pleadings. *It has been the practice to overrule a demurrer, unless it is founded upon an absolutely clear proposition that, taking the allegations to be true, the bill must be dismissed at the hearing.*”

In *Polk Company v. Glower*, 305 U. S. 5, the court definitely determines this point, in conformity without contention, in the following language (Op. pp. 9-10):

“We are of the opinion that the District Court erred in dismissing the bill of complaint. Plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits. Defendant’s motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. *For the purpose of that motion, the facts set forth in the bill stood admitted.* For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction. *But the findings of the court indicate that evidence, in part at least, underlay the final decree it entered.*”

We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity.”

In *Securities and Exchange Commission v. Gilbert*, 29 Fed. Supp. 654, the same question is treated as follows (Op. p. 655):

“It is conceded by counsel for defendants (as is the well settled law) *that for the purposes of this decision the motion to dismiss admits the truth of all the allegations properly plead.* Defendants contend, however, that whether or not the undivided interests referred to as ‘securities’ is solely a question of law

and that the allegation that defendants have been and are selling securities is a conclusion of law and therefore not admitted by the motion. With this the court cannot agree. As pointed out by plaintiff, doubtless questions of law may enter into the determination as to whether a particular interest is a 'security' but an allegation that the defendants are selling securities is an allegation of fact. It may be upon a trial, after hearing all of the evidence, the court may determine that, as a matter of law, the particular thing being sold is not a 'security' but for the purposes of the present motion the court must consider the allegation as merely one of fact, *and by defendant's motion it is, therefore, for the present purposes, admitted that the defendants 'are now selling securities described by the defendants as "undivided interests," etc.'*”

In *Sherover v. John Wanamaker*, 29 Fed. Supp. 650, the defendant in support of his motion to strike or dismiss submitted an affidavit with respect to some of the facts. The court in deciding that the motion to dismiss could not be aided by an affidavit, states as follows (Op. pp. 651-652):

“Defendant cannot ask the court on this present motion to consider a sample of the alleged infringing mattress, referred to in an affidavit of the general sales manager of the U. S. Rubber Company as the type of mattress sold to John Wanamaker by the U. S. Rubber Company under the trademark 'Royal Foam.' *The motion to dismiss a claim under Rule 12 (b) (6) must be based on the pleading and may not be aided by affidavits.* *McConville v. District of Columbia D. D.*, 26 F. Supp. 295.”

Upon this subject in *Lehigh Coal & Navigation Co. v. Central R. of New Jersey*, 33 Fed. Supp. 362 (Op. p. 363), it is stated:

“Defendant filed a motion to dismiss. The motion to dismiss is limited to the allegations of the complaint, and is being the equivalent of a demurrer, the court is called upon to interpret the allegations of such complaint, *and to accept all such allegations as being true* and to determine whether such complaint presents a cause of action based upon the Federal Declaratory Judgment Act.”

COMMENT.

The record in this case discloses that, in considering and deciding the appellees’ “motions to dismiss” and entering the resulting “judgment of dismissal,” the court considered the affidavit of one Hector Campana [Tr. 271-273], the affidavit of Edmund Nelson [Tr. 269-270] a letter from Cosgrove & O’Neil, attorneys for the appellee Amadeo P. Giannini [Tr. 362 to 366] with certain documents purporting to be copies of “minutes of certain meetings” of the Board of Directors of the “defendant corporation.” [Tr. 366-416.]

It is obvious that the foregoing documents were, by the appellees intended, and by the District Court considered, *as evidence* showing that the appellant in December, 1931, received the so-called Walker-Bacigalupi letter [Ex. A attached to affidavit of Hector Campana, Tr. 274-281] and acquired knowledge regarding the Giannini-Bancitaly corporation “salary agreement” and its use up to that time, thereby starting the running of the Statute of Limitations or requiring the application of the doctrine of “laches” to appellant’s action.

It is also clear that, if a trial upon the merits were taking place, the appellant would have the legal right to cross-examine the witnesses concerning the circumstances surrounding the transactions mentioned in such documents together with *the right to deny receipt of the letter* in question and all knowledge and information concerning the various matters set forth in the documents. This at least would give the court an opportunity to weigh the evidence and base proper findings of fact thereon. This evidence is in *direct conflict* with the averments of appellant's "pleading" contained in Par. XLI. [Tr. 183-186.]

In addition to the evidence above mentioned the District Court also considered some of the statements set forth in the Securities & Exchange Commission "order" mentioned in the "pleading" as *established facts* which started the Statute of Limitations or required the application of the doctrine of "laches" as a bar to the further prosecution of appellant's action. [Tr. 347-351.]

It will be observed from the court's remarks in support of its "conclusion", which we specify as error in Point II (Br. p. 36) [Tr. 492], that after summarizing the "order" of Commission, the District Court in considering and weighing the facts set forth therein stated [Tr. 349, 350, 351]:

"It is to be noted that nowhere in the aforementioned order did said Commission declare or even intimate there was reasonable ground to believe that any of the defendants had engaged in a conspiracy or in any of the alleged wrongful acts complained of herein. On the contrary, the above quoted excerpt from said order rather would imply that said Commission believed that the management of Transamerica at

least as it existed in September, 1931, had challenged the legality of the aforementioned credits entered in favor of the defendant A. P. Giannini, also that the Commission found that in 1931 the then existing board of directors of that corporation had been hostile to and had prevented him from drawing any further sums under said credits, and further believed that it was not until some time after 'the change in management in 1932' that he succeeded in withdrawing any additional sums on account of such credits.

Furthermore, in view of the fact that at the time of the filing of the second amended complaint, *namely, after it had been conducting its investigation over a period of about four years, said Commission had not been able to conclude the same, nor had it been able to determine whether Transamerica had failed to comply with any of the provisions of the Securities and Exchange Act or of its rules, or whether it would be necessary or appropriate to suspend or withdraw the registration of Transamerica's capital stock on any of the national exchanges, it can hardly be said that said order of the Commission supports plaintiff's averment to the effect that the disclosures made in said order uncovered the alleged wrongful acts of which she complains in the present lawsuit.*

Indeed the status of the proceeding before said Commission after the lapse of nearly four years as above described, and the further circumstances that the Commission's order, upon which plaintiff apparently mainly relies to justify the very long delay in the filing of the present suit, *contains no recitals supporting the charges she has made herein.*"

The foregoing observations of the District Court indicate that a trial upon the merits of the action had taken place.

The only purpose of referring to the Commission "order" in the "pleading" *was to disclose the circumstances under which the appellant first discovered "suspicious circumstances" concerning the management of the affairs of the defendant corporation.* This was in April, 1939, and places no limitation whatsoever upon the *facts which appellant discovered subsequent thereto.* It is difficult for us to understand the District Court's reason for thinking that appellant based the averments of her pleading merely upon the information contained in such order, and, even if it be true, that the Securities and Exchange Commission did not declare or intimate in said "order" there was reasonable ground to believe that any of the appellees had engaged in a conspiracy or in any of the wrongful acts set forth in the "pleading", *yet such facts may have existed. They were later discovered by appellant.*

We are also at a loss to understand the court's statement to the effect, that the disclosures made in the "order" of the Commission failed to uncover the wrongful acts of which appellant complains. The manner and method by which appellant discovered the facts of the case which she presents by her pleadings are, in ~~one~~^{our} opinion, in no manner *material to a determination of the "motions to dismiss."*

Regarding the District Court's consideration of the Commission "order", permit us to also suggest, that if any portion of the contents thereof is effective for any purpose with respect to the "Statute of Limitations" or "laches", *it must be limited only to a portion of the Giannini-Banc-italy Corporation "salary agreement" transaction.*

Instead of stating, that at the time of the filing of appellant's pleading, the commission had been conducting its

investigation over a period of about four years and had not been able to conclude the same nor to determine the issues involved, *the court would have been fully justified in taking judicial notice of the then status of that proceeding.* We believe that this court, if deemed material, may well take judicial knowledge of the fact *that the hearings before the "Examiner" concerning said "proceeding" were concluded in Philadelphia on April 4, 1944, and are pending the preparation of findings of fact, the advisory report of the Examiner, and the opinion of the Commission.*

It is obvious that the District Court has erroneously treated and considered the appellant's purpose and the legal effect of mentioning the commission's order in her "pleading" and has given a *factual* interpretation thereof which is not justified in considering the appellees' motions to dismiss.

Whatever controversy existed, if any, between any of the members of the several boards of directors of the "defendant corporation," upon a trial of the action, may, and probably will, only tend to establish the facts averred by the appellant in her "pleading." Here again appellant has the right to make, or attempt to make, such a showing upon a trial.

We respectfully and firmly urge, that in the respect here discussed, the District Court committed reversible error irrespective of any other action taken or decision made by it. The decisions which we have heretofore cited lead to no other conclusion. To hold otherwise would overturn all legal precedent, destroy established procedure, and grant courts arbitrary rights to summarily determine important issues.

Explanatory Remarks.

We have limited our discussion, with respect to the errors of the District Court, to the several reasons or grounds expressly stated or inferred in the court's "Memorandum of Conclusions." [Tr. 321-360.]

Some of the grounds mentioned in the appellee's "Motions to Dismiss" do not appear to have been considered or decided by the District Court and are not subject to review.

The District Court's "Memorandum of Conclusions" is the only guide we have concerning the grounds assigned for the court's decision and we have endeavored to submit "specifications of error" which respond thereto.

The greater part of the "transcript of the record" consists of pleadings, documents and argument concerning the appellant's original complaint and first amended complaint which were superseded by the appellant's second amended complaint upon which her case stands. The numerous motions directed toward the appellant's former pleadings were not decided and are not before this court for determination. (*Winter v. Bostwick*, 212 Federal 884 (C. C. A. 7th) (Op. p. 887).) This is likewise true of all of the appellees' motions directed to appellant's second amended complaint here involved, except their "motions to dismiss."

Conclusions.

In our concluding remarks we deem it proper to refer briefly to that part of the District Court "conclusion" [Tr. 360], and order [Tr. 320], granting the appellant permission to file an application for leave to file a third amended complaint.

The “conclusion” and “order” of the Court considered in the light of its “Memorandum of Conclusions,” makes it plain that a third amended complaint, to receive the approval of the Court, must comply with each and all of the adverse conclusions of the Court concerning the present “pleading.” This requires appellant to change the legal theory and basis of her action and substitute a pleading which could not fully protect the interest of the shareholders nor of the “defendant corporation,” and under which, a full and complete presentation of the evidence could not be made.

Counsel for appellant does not claim perfection for the “pleading” here involved and is quite willing, if properly advised, to make any corrections of form which may be required, but on the other hand is unwilling to basically change the legal theory to one which does not give the complete relief to which the shareholders and “defendant corporation” are entitled under the facts.

In view of the errors of the District Court, which are presented herein, we sincerely urge that the judgment of the District Court be reversed and the case remanded for further proceedings.

Respectfully submitted,

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of TRANSAMERICA CORPORATION and in behalf of all other shareholders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI, AMADEO P. GIANNINI (as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased), BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a national banking association (as Administrator-with-the-Will-Annexed of the Estate of John M. Grant, Deceased), GORDON GRAY, O. D. HAMLIN, T. W. HARRIS, A. P. JACOBS, F. C. STEVENOT, RUSS AVERY, P. A. BRICCA, GEORGE J. DE MARTINI, W. N. LAGOMARSINO, A. J. SCAMPINI, WILLIAM E. BLAUER, LEON BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F. MORRISH, A. J. MOUNT, ALFRED E. SBARBORO, CHESTER H. LOVELAND, P. C. HALE, JAMES A. BACIGALUPI, ARMANDO PEDRINI, GEORGE A. WEBSTER, E. J. NOLAN, C. R. BELL, W. W. GARTHWAITE, GEORGE N. ARMSBY, LOUIS FERRARI, V. SCIALOJA, THEODORE M. STUART, HERBERT E. WHITE, CHARLES DE Y. ELKUS, WILLIAM S. HOELSCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C. WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI and CLAIRE GIANNINI HOFFMAN, transacting business as co-partners under the firm name and style of WALSTON & CO., and AMADEO P. GIANNINI (as the Executor of the Last Will and Testament of Virgil D. Giannini, a deceased member of said co-partnership), WALSTON & CO., a co-partnership and TRANSAMERICA CORPORATION, a corporation,

Appellees.

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SUMMARY STATEMENT.

Appellant as a stockholder thereof commenced this action on behalf of defendant Transamerica Corporation. Thirty-four persons who had served as directors at different times and for varying intervals during the 12 year period covered by the Complaint were eventually named defendants. Other persons who had not been directors or officers of the corporation were also named defendants. The claims alleged injury to Transamerica and 26 of its subsidiaries (specifically named), but no one of which was made a defendant and no one of which was alleged to be wholly owned by Transamerica.

In the First Amended Complaint several claims founded on separate transactions were not stated separately. Upon motion of defendants the court directed that the separate transactions be stated separately. Counsel for plaintiff agreed to plead the claims in separate counts.

A Second Amended Complaint was filed expressly charging a continuing conspiracy involving all separate transactions enumerated in the First Amended Complaint but failed to comply with the court order directing, and the agreement of counsel, that the separate transactions be stated separately. Defendants filed motions to dismiss on the ground that the complaint failed to state a claim and failed to comply with the court order to state separately the various causes of action, and further, that the claims attempted to be stated were barred by limitations and laches and that Transamerica's subsidiaries were indispensable parties. Motions for separate statement, for a more definite statement, and to strike, were also filed. The court granted the motions to dismiss, assign-

SUMMARY STATEMENT—(Continued).

ing as reasons for its action that plaintiff should have stated her claims separately; that there was a failure to state a claim; that the claims as attempted to be stated were barred by the statute of limitations; and that the complaint was indefinite in certain particulars. The court order expressly provided that the plaintiff have a period of forty-five days within which to apply upon notice for leave to file a Third Amended Complaint and requiring service of proposed Third Amended Complaint and Points and Authorities. Plaintiff failed to file or apply for leave to file a Third Amended Complaint within the period. Thereafter the court dismissed the action. From the judgment of dismissal plaintiff has appealed.

No. 10625

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of
TRANSAMERICA CORPORATION and in behalf of all other share-
holders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI,
AMADEO P. GIANNINI (as Executor of the Last Will and Testa-
ment of Virgil D. Giannini, Deceased), BANK OF AMERICA
NATIONAL TRUST & SAVINGS ASSOCIATION, a national
banking association (as Administrator-with-the-Will-Annexed of the
Estate of John M. Grant, Deceased), GORDON GRAY, O. D. HAM-
LIN, T. W. HARRIS, A. P. JACOBS, F. C. STEVENOT, RUSS
AVERY, P. A. BRICCA, GEORGE J. DE MARTINI, W. N. LAGO-
MARSINO, A. J. SCAMPINI, WILLIAM E. BLAUER, LEON
BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F.
MORRISH, A. J. MOUNT, ALFRED E. SBARBORO, CHESTER
H. LOVELAND, P. C. HALE, JAMES A. BACIGALUPI, ARM-
ANDO PEDRINI, GEORGE A. WEBSTER, E. J. NOLAN, C. R.
BELL, W. W. GARTHWAITE, GEORGE N. ARMSBY, LOUIS
FERRARI, V. SCIALOJA, THEODORE M. STUART, HERBERT
E. WHITE, CHARLES DE Y. ELKUS, WILLIAM S. HOEL-
SCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C.
WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI and
CLAIRE GIANNINI HOFFMAN, transacting business as co-partners
under the firm name and style of WALSTON & CO., and AMADEO
P. GIANNINI (as the Executor of the Last Will and Testament of
Virgil D. Giannini, a deceased member of said co-partnership),
WALSTON & CO., a co-partnership and TRANSAMERICA COR-
PORATION, a corporation,

Appellees.

APPELLEES' BRIEF.

(Italics are ours unless otherwise noted. Except when
stated otherwise all references to Rules are to the Federal
Rules of Civil Procedure.)

Jurisdictional Statement.

The ground of jurisdiction of the District Court is diversity of citizenship (Judicial Code, Sec. 24; 28 U. S. C. Sec. 41, subd. 1). The original, the First Amended and the Second Amended Complaints each alleged the required diversity of citizenship [R. 5-6; 28-31; 146-149], and that more than \$3,000, exclusive of interest and costs, was involved [R. 6; 31; 150].

On June 9, 1943, final judgment of dismissal was entered [R. 448-451]. On September 7, 1943, plaintiff filed her notice of appeal [R. 451-452]. The jurisdiction of this court is founded on Section 128 of the Judicial Code (28 U. S. C. Sec. 225, subds. (a) and (d)).

Opinions Below.

At the hearing of the argument on appellees' motions directed at the First Amended Complaint, the court on June 25, 1942, made an extended statement which is transcribed and appears in the record [R. 457-476].

The court having directed plaintiff to file a Second Amended Complaint [R. 141-142] and such complaint having been filed [R. 143-192], motions directed at this complaint were made by appellees. On April 16, 1943, the court filed its Memorandum of Conclusions, which may be found in the record [R. 321-360].

Neither of these opinions has been officially reported. The opinion rendered April 16, 1943, is printed in the Appendix hereof, page 7 *et seq.*, for the convenience of this court.

Statement of the Case.

Appellant's Statement of the Case (Br. pp. 4-34) is definitely inadequate. It does not present to this court the facts necessary for a proper review of the judgment of the District Court. Appellees' motions directed at the Second Amended Complaint were predicated not only upon the infirmities of that complaint, but also upon proceedings in the action occurring prior to the filing of said complaint [R. 214-215; 235-236; 253; 268; 293; 318]. The District Court in considering the matter took into account said proceedings [R. 321-327].

Accordingly, appellees find it necessary to present the following complete Statement of the Case:

The Original Complaint [R. 4-24].

Appellant commenced this action on April 16, 1941 [R. 24], suing in behalf of Transamerica Corporation (hereinafter called Transamerica), of which she alleged she had been a stockholder since 1929 [R. 5].¹

Appellant named the following defendants: Amadeo P. Giannini (A. P. Giannini), L. M. Giannini, one John

¹It was not until the Second Amended Complaint that plaintiff disclosed the number of shares of Transamerica owned by her, to wit, 57 shares [R. 146]. From a document submitted by her in connection with the Second Amended Complaint, it appears that in 1938 Transamerica had 11,590,784 shares of stock outstanding [R. 417]. The record therefore discloses that appellant had slightly less than 1/2000th of 1% of the outstanding shares of Transamerica—that had Transamerica recovered and collected a judgment for \$10,000,000.00 [R. 62], appellant would have been benefited thereby in an amount less than \$50.00. The significance of the fact that appellant's interest is so trivial will be considered in the argument (*post*, pp. 31-32).

M. Grant; Gordon Gray and ten other individuals ("new directors"), none of whom were directors of Transamerica before 1932 [R. 7]; William E. Blauer and six others ("old directors"), none of whom were shown to be directors of Transamerica after 1931 [R. 7]; Charles deY. Elkus and four other individuals individually and as co-partners doing business under the firm name of Walston & Co.; Bank of America National Trust & Savings Association (in its individual or corporate capacity); and of course Transamerica [R. 4].

There were no fictitious defendants.

It was alleged that Pacific Coast Mortgage Company and certain other named corporations were at all times wholly owned or virtually wholly owned subsidiaries of Transamerica; and that in 1937 Bank of America had ceased to be a wholly owned or virtually wholly owned subsidiary of Transamerica, which thereafter owned approximately thirty per cent of the stock of Bank of America [par. 4, R. 5-6].

Appellant alleged a number of different transactions (so designated by the pleader [R. 15, 20]) and asked for an accounting. It will not be necessary to notice particularly the different transactions, of which there were at least six. Three of them, namely, the third [pars. 21-23, R. 13-15], the fourth [pars. 24-25, R. 15-17], and the sixth [par. 28, R. 18-19] were not repeated in the subsequent complaints. The first [pars. 12-17, R. 8-11], which in its present form appellant designates as the "'Bancitaly Corporation' transactions" (Br. p. 18), survived as the first transaction in the subsequent complaints. The second transaction [pars. 18-19, R. 11-12] which may be referred to as the "Market" transaction

appeared in the subsequent complaints as the fifth transaction.

The fifth transaction [par. 26, R. 17-18], now referred to as the “‘Walston & Co.’ transactions” (Br. p. 21), appears in the subsequent complaints as the second transaction, but in a fundamentally different form.

In addition to the foregoing there were two paragraphs, in one of which it was alleged that from 1937 to date defendants who were officers and directors of Transamerica received remuneration from Transamerica, Pacific Coast Mortgage Company and other subsidiaries and affiliates of Transamerica in excess of that to which they were legally entitled [par. 27, R. 18]. In the other paragraph it was alleged that from 1931 to date A. P. Giannini, A. H. Giannini, L. M. Giannini and John M. Grant had participated in pools for the purpose of manipulating the market value of Transamerica's stock in order to enable them to buy and sell said stock at substantial profits; that they made substantial profits for which they should account to Transamerica [par. 29, R. 19].

It was alleged that “the acts and transactions” referred to were a part of a plot, plan and conspiracy by A. P. Giannini, A. H. Giannini (not then a defendant), L. M. Giannini and John M. Grant; that all of the defendants who have been directors of Transamerica from 1931 to date became parties to said unlawful plot, plan and conspiracy, in that they knew of, acquiesced in and consented to all of the wrongful acts committed [R. 20].

There were further allegations designed to avoid the bar of the statute of limitations [R. 21] and to excuse plaintiff's failure to make demand upon the Board of Directors of Transamerica [R. 21].

The complaint was verified as required by Rule 23(b), [R. 22-23], but all of the allegations, excepting the allegations of plaintiff's citizenship, her stock interest, and the fact that the suit was not collusive, were made upon information and belief [R. 5].

First Amended Complaint [R. 24-64].

The original complaint although filed was not served, and on December 29, 1941, appellant filed her First Amended Complaint [R. 24-64]. She omitted Bank of America National Trust & Savings Association as a defendant in its individual capacity, but named it defendant as Administrator-with-the-will-annexed of said John M. Grant, deceased.

A number of new defendants were added. Defendants A. P. Giannini and L. M. Giannini were now also named as partners of Walston & Co. and were sued in that capacity. In addition, defendant A. P. Giannini was sued as Executor of the Estate of Virgil D. Giannini, and as Executor of the Estate of Virgil D. Giannini, deceased, an alleged member of Walston & Co.

A. H. Giannini and five other individuals (belonging to the class of "old directors") were joined for the first time as defendants, as were Herbert E. White, Theodore M. Stuart, "new" directors [R. 33], and Claire Giannini Hoffman, who was named as a partner of Walston & Co. This firm was also added as a defendant.

All of the defendants above named appeared and are appellees here. In addition, the First Amended Complaint named four defendants, P. C. Hale, Armando Pedrini,

George N. Armsby and Victor Scialoja, who were not served and did not appear.²

The First Amended Complaint also added approximately thirty-five fictitious defendants.

Appellant definitely alleged that she had been a stockholder of Transamerica since March 7, 1929 [R. 27].

Appellant alleged that Transamerica was at all times engaged in the general business of acquiring, holding, owning, controlling and operating other corporations, among others including Bank of America National Trust and Savings Association, a national banking association, Pacific Coast Mortgage Company, a corporation, and other named corporations [par. II, R. 27].

It was alleged that, during all times mentioned in the First Amended Complaint, defendants Amadeo P. Giannini, L. M. Giannini and John M. Grant, now deceased, by and through stock ownership, proxies and various other means and devices, selected and named the officers and members of the Board of Directors of defendant Transamerica Corporation, and controlled, dominated and determined its entire business policies. It was further alleged that the directors and officers of Transamerica did not exercise any business judgment and knowingly permitted their official acts and conduct to be dictated, controlled and dominated by the three defendants named for the purpose of enhancing the personal and individual interests of each of said defendants [R. 34-35]. There were no affirmative allegations of a conspiracy.

²It was suggested in the argument below that Mr. Armsby was outside the jurisdiction and that the other three were dead.

In the First Amended Complaint appellant predicated her right to recovery in behalf of Transamerica on five separate and distinct transactions. An examination will show that these transactions occurred at different times, were of a different character and nature, and were committed by different persons. Briefly, the five transactions were as follows:

1. *Salary agreement, 1927-1938.* Recovery of \$5,-000,000.00 alleged to have been paid to A. P. Giannini under the salary agreement. This transaction consisted of three alleged wrongs: (a) the passage in 1927 by the Board of Directors of Bancitaly Corporation (Transamerica's alleged predecessor) of the resolution giving A. P. Giannini 5% of the profits in lieu of salary and payments thereunder; (b) the assumption by Transamerica on December 27, 1928 [R. 39] of the unpaid balance, and (c) further payments to Mr. Giannini [R. 35-43].³ It was alleged that the 5% was knowingly computed upon "false, fictitious, inflated and untrue book profits" [R. 41]. Although the original complaint set out in some detail the methods employed to inflate the profits of Bancitaly [R. 9-11], no further details were given in the First Amended Complaint, but instead it is recited that the precise extent of said profits was unknown to plaintiff [R. 41].

2. *Walston & Co. transaction, 1932-1938.* Recovery of \$500,000 because of (a) diversion of profitable business to Walston & Co. (in which the Gianninis were alleged to be interested) and the payment "unnecessarily"

³It will be observed that the first two of these alleged wrongs very definitely occurred before plaintiff became a stockholder on March 7, 1929 [R. 27]. (Compare Rule 23(b).)

of large and substantial brokerage fees, and (b) payment of substantial sums of money for use as capital by Walston & Co. [R. 45-47].

3. *Pacific Coast Mortgage transaction, 1932-1935.* Recovery of \$2,000,000.00 profits of Pacific Coast Mortgage Company, the controlling interest of which was alleged to have been obtained in 1932 by the Gianninis with funds advanced by Transamerica, whereby each of said defendants was "unjustly enriched to the detriment of defendant Transamerica Corporation and its shareholders" [R. 50-53].

4. *Mallory-Smith transaction, 1933-1935.* Recovery of \$75,000.00 profits of the Mallory-Smith syndicate in speculative operations in the purchase and sale of Transamerica stock on money advanced by Transamerica. It was alleged that these profits were received by Amadeo P. Giannini, L. M. Giannini and Virgil D. Giannini, deceased, and that each of these defendants was "unjustly enriched to the detriment of defendant Transamerica Corporation and its shareholders" [R. 53-56].

5. *The Market transaction, 1933-1936.* Recovery of \$2,250,000.00 alleged to have been paid by Transamerica to Associated American Distributors, Inc. (a Transamerica subsidiary), in reimbursement for expense in soliciting orders from the general public for the purchase of stock of Transamerica [R. 56-58]. In alleging this transaction reference was made to the Pacific Coast Mortgage Company and the Mallory-Smith transactions [R. 56-58].

There were allegations seeking to avoid the bar of the statute of limitations [R. 58-61] and to excuse plaintiff's omission to make demand upon the Board of Directors of Transamerica [R. 61]. It was not alleged that plaintiff had made an appeal to the stockholders.

Plaintiff prayed for the declaration of a trust relationship, for an accounting and for a judgment of \$10,000,-000.00 in favor of Transamerica, for attorney's fees and general relief [R. 62].

As required by Rule 23(b), F. R. C. P., the First Amended Complaint was likewise verified [R. 63]. All of the allegations were made on information and belief [R. 26], except the allegations as to plaintiff's stock ownership, her residence, and the allegations designed to avoid the bar of the statute of limitations.

**Appellees' Motions Directed at
First Amended Complaint [R. 65-140].**

Appellees (Transamerica excepted), appearing singly or in groups, filed a number of motions directed at the First Amended Complaint. All of the appellees moved to dismiss. Most of them moved for an order requiring plaintiff *to separately state* causes of action in separate counts and for a more definite statement or bill of particulars and to strike. The motions for separate statement, generally speaking, requested the court to require plaintiff to state the transactions complained of in three separate counts, (1) the salary agreement transaction, (2) the Walston & Co. transaction, and (3) the Pacific Coast Mortgage Company, Mallory-Smith and the "Market" transactions.

**Hearing on the Motions Directed at
the First Amended Complaint [R. 452-476].**

The motions were argued before the court on June 23, 24 and 25, 1942. As counsel for appellee, A. P. Gianini, was about to argue the motion for a separate statement of transactions, he was interrupted by the court,

who made inquiry of counsel for appellant. The colloquy between the court and counsel for appellant appears in the record [R. 452-454]. It is clear from this discussion that the *court directed, and counsel for appellant agreed, to state separately the separate transactions.*

When counsel for A. H. Giannini, *et al.* (old directors), started to argue the motion for separate statement, the court interrupted with the observation, "We have already ruled favorably on that." [R. 454.]

During the course of the argument the court made reference to a fact which had received publicity some years before, namely, that at one time the A. P. Giannini group was out of control of Transamerica [R. 455-456]. Counsel for plaintiff stated he would be glad "to investigate that matter and take care of it in the amended complaint in conformity with the facts" [R. 457].

On Thursday afternoon, June 25, 1942, the court made an extended statement from the bench, which appears in the record [R. 457-476]. The court examined the various allegations of the complaint, commenting on the numerous transactions alleged [R. 459-470] and particularly upon the fact that plaintiff had alleged matters in respect to the salary agreement and had asked for relief for payments made to Mr. Giannini before Transamerica was incorporated and, of course, before plaintiff became a stockholder [R. 461-462].

Again the subject of separate statement came up, and the following colloquy occurred:

"Mr. Boardman: If the court please, in respect to the question of these items in the complaint that we follow separate items like the salary transaction, the Walston & Co. transaction, and the Mallory trust

transaction, with respect to the court's suggestion that perhaps all are independent and, in a sense, that they should not be united in one complaint, while I feel that we have not exactly done justice to that point, I would like to present a memorandum on it if the court would grant us a little time. I am sincere about that. I think that rule—

The Court: I wonder if perhaps this would not be a way of getting at it and perhaps minimizing the time and the labors of all of us: I have allowed—and I am not certain that this would answer the purpose, but I seem to think that it would—namely, that if an amended complaint were to be filed which would consist of several counts, one in which you would embody as much of the present complaint as you think you still desire to retain, and then a series of additional counts in which you might split up these several different transactions, as they presently appear to me to be, at least, that portion of the problem that I have tried to outline will clearly be presented as fully as the plaintiff can. In other words, you will have done it both the way you now think it ought to be done and the way, at least, I think it is necessary to segregate it; and that will afford an opportunity to the other side to make separate and distinct attacks upon several counts in the bill. And in that same connection I am suggesting that I think we ought to have an opportunity, at least, to rule upon the question as to what liability you claim arose prior to the formation of Transamerica, what liability arose following its formation, and that in turn there, I think some effort should be made to permit those particular defendants who admittedly were directors only up until 1932 to have an opportunity at least, to make their attack because obviously it is conceivable that it might ultimately be held that

liability exists as against them only for the limited periods that they were directors.” [R. 470-471.]

Still later counsel for appellant stated:

“Mr. Boardman: Now, as I said before, we have no objection to separating our complaint into counts on the various statements of the claims * * *.” [R. 473.]

The court then suggested that it would want to reserve until after the amended complaint had been filed its ultimate conclusion in respect to appellees’ contention that the First Amended Complaint was defective in failing to allege an appeal to stockholders of Transamerica or matters in excuse thereof. Counsel for appellant, having admitted that no appeal to the stockholders had been made [R. 474], the court suggested that the amended pleading be amplified in that respect.

The Minute Order of June 25, 1942
[R. 141-142].

The minute order entered at the close of the argument on the motions directed at the First Amended Complaint reads as follows (omitting recitals):

“The Court makes a statement *re* its present views.

It is ordered that the plaintiff serve and file amended complaint within sixty (60) days and that the defendants have thirty (30) days thereafter to plead thereto.” [R. 142.]

The Second Amended Complaint
[R. 143-190].

On August 21, 1942, plaintiff filed her Second Amended Complaint. She did not state separately any of the five transactions. Instead, she stated all of the transactions

in a single count prefaced by elaborate allegations of a civil conspiracy [R. 150-156].

The conspiracy was alleged to have been initiated on October 11, 1928 [R. 150], the date of Transamerica's incorporation [R. 144]. It was alleged that all of the individual defendants, as well as Virgil D. Giannini and John M. Grant, both deceased, together with certain *other persons not named or sued as defendants*, were members of the conspiracy [R. 150]. The "other persons" referred to were those who had been directors of Transamerica at some time during the thirteen-year period, but who had not been named as defendants [R. 160-161]. The allegations referred to therefore allege that everyone who at any time had been a director of Transamerica, including three who were not directors until 1940 [R. 161], after all overt acts were completed [R. 167; 170; 178; 179; 180], as well as Walston & Co. and its alleged partners, were members of the conspiracy.⁴

Generally speaking, it was then alleged in paragraph XIX that the conspirators conspired to use defendant Transamerica and its subsidiaries for their own private benefit, and for such purpose and for their own individual use and benefit [1] "to wrongfully appropriate" moneys and property of Transamerica and its subsidiaries, [2] "to wrongfully use" moneys and property thereof, and [3]

⁴These sweeping allegations were somewhat tempered if not nullified by the allegations of paragraphs XXIV [R. 161] and XXV [R. 162], in which by hypothetical and alternative allegations it was alleged that directors not conspirators were dummies, and if not conspirators or dummies either failed to discover any of the wrongful acts, or having discovered the same knowingly failed to take action. The question whether alternative and hypothetical allegations permitted in the ordinary case by Rule 8(e) (2) are proper in a stockholder's complaint required by Rule 23(b) to be verified, will be considered in the argument.

“to use their official position” with Transamerica “and the confidential and special knowledge gained thereby” [R. 150-151]. Paragraph XIX then sets out the alleged agreement between the conspirators [R. 151-156]. According to the allegations the conspirators agreed as to the *wrongs* to be done Transamerica: [the lettering is the pleader’s] (c) to use moneys and properties of Transamerica and its subsidiaries in their private business enterprises [R. 152]; (d) to assume pretended contracts and cause moneys to be misappropriated to defendants [R. 152-153]; (e) to use official positions and confidential and special knowledge gained thereby for their private gain and profit; to manipulate the stock of Transamerica and cause Transamerica to finance the same [R. 153-154]; (f) to divert business of Transamerica and its subsidiaries to corporations, etc., in which conspiring defendants were interested [R. 154].

The agreed *mechanics* by which these wrongs were to be perpetrated were alleged to be: (a) to maintain voting control of shares of Transamerica [R. 151]; (b) to control the Board of Directors of Transamerica [R. 151-152]; (g) some directors of Transamerica to actively propose, others to remain passive [R. 154-155]; (h) to conceal their operations [R. 155], and (i) if control of Transamerica were lost, to regain control [R. 155-156].

In paragraph XX of the Second Amended Complaint it is alleged that thereafter “from time to time” and for the purpose of effecting said conspiracy, “the said defendants and persons committed and performed the following acts, and engaged in *the following transactions and series of transactions* as set forth in the succeeding paragraphs hereof, namely, XXI to XL, inclusive” [R. 156].

After alleging that said defendants and persons obtained control of all Transamerica stock [par. XXI, R.

156-157] and giving the names of the defendant directors of Transamerica and their periods of office [par. XXII, R. 157-159], and the names and terms of office of the directors who were not defendants [par. XXIII, R. 159-161], the complaint made the hypothetical and alternative allegations [R. 161-162] already mentioned (footnote 4, *supra*).

With certain changes from the allegations of the First Amended Complaint, the Second Amended Complaint, as the trial court later pointed out, charged "the commission of several separate and distinct series of wrongs, each disconnected from all the others" [R. 354]. These five, separate and distinct transactions were pleaded in the Second Amended Complaint in the following order:

(1) The salary agreement transaction (Bancitaly Corporation transaction), paragraphs XXVI-XXIX [R. 162-169]; Recovery \$3,700,000.00 [R. 168];

(2) Walston & Co. transaction, paragraphs XXX-XXXIII [R. 169-173]; Recovery \$548,000.00 [R. 172];

(3) The Pacific Coast Mortgage Company transaction, paragraphs XXXIV-XXXVI [R. 173-177]; Recovery \$2,000,000.00 [R. 177];

(4) The Mallory-Smith Syndicate transaction, paragraphs XXXVII-XXXVIII [R. 178-180]; Recovery \$300,000.00 [R. 180];

(5) The "Market" transaction, paragraph XXXIX [R. 180-182]; Recovery \$2,250,000.00 [R. 181].

Some changes were made, particularly in the transaction involving the salary agreement [R. 162-169]. The allegation of the First Amended Complaint that "Bancitaly Corporation, acting by and through its said Board of Directors" [R. 37] made the salary agreement, was omitted.

The date upon which the stock and assets of Bancitaly Corporation were absorbed and the salary agreement assumed was now alleged to be May 25, 1929 [R. 162], instead of December 27, 1928, as alleged in the First Amended Complaint [R. 39]. The amount sought to be recovered on this transaction was reduced from \$5,000,000.00 to \$3,700,000.00 [R. 165].

In the First Amended Complaint the beneficiaries of the various transactions were alleged to be A. P. Giannini, or A. P. Giannini and certain of his named children. But in the Second Amended Complaint it was generally alleged that "said defendants and persons," *i. e.*, all the alleged "conspirators," were unjustly enriched [R. 167-168; 172; 177; 180].

In the First Amended Complaint the wrongs were alleged to have been done to Transamerica. In the Second Amended Complaint the phrasing was "Transamerica and its subsidiaries, departments and instrumentalities," or words of similar import. The "injury and detriment" alleged to have been suffered by Transamerica and its shareholders in the First Amended Complaint was alleged in the Second Amended Complaint to have been suffered by Transamerica and its subsidiaries, departments, instrumentalities and shareholders.⁵

Interspersed among the allegations setting forth the five transactions were allegations that the matters complained of were concealed [par. XXIX, R. 168-169; par. XXXIII, R. 173; par. XXXV, R. 176; par. XXXVII, R. 179; par. XL, R. 182].

⁵The allegations in reference to the subsidiaries are stated more particularly in the Argument (Point IV, *post*).

In paragraph XLI, appellant made allegations intended to avoid the bar of the statute of limitations. She referred to certain quasi judicial proceedings pending before the Securities and Exchange Commission, and particularly to an order for hearing “which had been released under date of November 25, 1938” [R. 185].⁶ A copy thereof was tendered for filing [R. 185] and will be found in the record [R. 417-445]. It was alleged that on the 27th day of April, 1939, the S. E. C. proceedings were called to appellant’s attention [R. 184], thus she learned for the first time matters, facts and charges contained in said order [R. 185]. There were further allegations that prior to April 27, 1939, she had no notice, knowledge or information, etc. [R. 185], and that upon such discovery of suspicious circumstances she began an investigation which is still proceeding [R. 186].

There were allegations designed to excuse her omission to make demand upon the directors of Transamerica [par. XLII, R. 187], and her omission to make demand upon the shareholders [par. XLIII, R. 187-188].

The prayer asked for the declaration of a trust relationship, for an accounting, and recovery for Transamerica of \$8,798,000.00, for attorneys’ fees, costs and general relief [R. 188-189].

Pursuant to the requirements of Rule 23(b), F. R. C. P., the Second Amended Complaint was likewise verified [R. 190], but all of the allegations, excepting plaintiff’s stock ownership, her residence, her ownership of stock at the

⁶It will be recalled that the First Amended Complaint which alleged new causes of action and brought in a number of new defendants was filed on December 29, 1941, more than three years after the date of the *public release* of this order of the Securities and Exchange Commission [R. 64].

time of the transactions complained of, the allegations relating to her discovery and the allegations relating to her omission to make demand on the Board of Directors, were made upon information and belief.

**Motions Directed at the
Second Amended Complaint
[R. 193-318].**

Appellees (Transamerica excepted) singly or in groups filed motions directed at the Second Amended Complaint, which generally speaking were as follows:

1. Motions to dismiss (Rule 12(b)) for failure to state a claim; claims barred by statute of limitations and laches; Transamerica's subsidiaries indispensable parties, and other grounds; and to dismiss (Rule 41(b)) because of plaintiff's failure to obey the order of court directing that the separate transactions be stated separately [R. 193-195; 218-219; 238-240; 256-258; 283-285; 296-298].

2. Motions for an order directing appellant to state separately the five separate and distinct causes of action [R. 195-199; 220-222; 240-242; 258-261; 285-287; 298-301].

3. Motions for a more definite statement or bill of particulars [R. 199-213; 222-233; 242-252; 261-265; 287-292; 302-316].

4. Motions to strike the entire Second Amended Complaint or designated portions thereof [R. 213-214; 233-234; 266-267; 316-317].

In all the notices of motion [R. 214-215; 235-236; 252-253; 267-268; 317-318], excepting that of Elkus, *et al.*, it was stated that the motions would be made upon the records and files, the affidavit of Hector Campana [R. 271-

281] and the affidavit of Edmund Nelson [R. 269-270] annexed to the motions of A. H. Giannini, *et al.*

In the affidavit of Hector Campana the affiant averred that he was then a Vice-President of Transamerica; that during the years 1930 and 1931 he was an Assistant Secretary of Transamerica; that a few days prior to December 8, 1931, he was given by the officers of Transamerica a letter to the stockholders dated December 9, 1931 (copy of which was annexed, marked Exhibit A [R. 274-281]); that he was directed to have said letter printed and sent to all of the stockholders; that he personally supervised the printing and mailing of said letter and that copies were sent to each stockholder, including appellant [R. 271-272]. The letter of December 9, 1931 [R. 274-281], Exhibit A to the Campana affidavit, contained a statement that in 1927 the directors of Bancitaly Corporation adopted a resolution approving payment to A. P. Giannini of 5% of the profits each year, that during the three-year period, 1927-1930, no less than \$3,700,000.00 had been paid to or placed to the credit of A. P. Giannini; that all of said \$3,700,000.00 had been withdrawn by or upon the order of A. P. Giannini, except an unpaid balance of \$792,000.00, which upon advice of counsel the Board of Directors of Transamerica had refused to pay [R. 275-276].

The affidavit of Edmund Nelson [R. 269-270], attorney of record for appellee Transamerica, averred among other things that on August 6, 1942, he delivered to counsel for appellant herein copies of certain documents, including a copy of said letter of December 9, 1931 [R. 270]; that on the following day he had delivered copies of the same documents to counsel for plaintiff in an action then pending entitled, *Abrams v. Avery, et al.*, and numbered

1393-H on the register of actions of the District Court [R. 269-270].⁷

Briefs were filed in support of, and in opposition to, these motions [R. 449].

**Hearing of the Motions Directed
at the Second Amended Complaint,
October 12, 1942 [R. 477-483].**

Appellees' motions directed at the Second Amended Complaint were heard on October 12, 1942. The court immediately called upon counsel for appellant to justify, if possible, his failure to state separately three, if not four, separate and distinct causes of action [R. 477]. Counsel, attempting to justify, stated that since the earlier pleading "certain things have occurred that caused a change in the pleading, not in the fundamental facts of how the money or property of Transamerica Corporation was used by these defendants, but the way they did it and the legal theory upon which it was done" [R. 479].

In the Second Amended Complaint appellant did not restrict Transamerica's claim for damages to the moneys paid under the salary agreement after December 9, 1931. After counsel for plaintiff had asserted that appellant had not received a copy of said letter [R. 481-482], there was a colloquy among court and counsel as to whether the mailing of this letter was an official act of the Board of Directors of Transamerica Corporation, counsel for certain appellees insisting that it was, referring to the Campana affidavit [R. 482]. Counsel for appellant stated he was advised otherwise [R. 483].

⁷The letter dated December 9, 1931, was pleaded by Abrams [R. 482].

Thereafter additional briefs were filed in support of and in opposition to the motions [R. 449], and on October 27, 1942, counsel for appellee, A. P. Giannini, sent to the court and to opposing counsel a letter [R. 362-366] in which was enclosed a photostatic copy of the minutes of the meeting of the Board of Directors of Transamerica held on December 9, 1931 [R. 366-416]. These minutes substantiated the statement made by counsel for appellees at the hearing on October 12, 1942 [R. 482], that said letter of December 9th was sent out by direction of the Board of Directors of Transamerica [R. 407].

**The Court's Opinion
(Memorandum of Conclusions)
Granting Motions to Dismiss
[R. 321-360].**

On April 16, 1943, the court rendered and filed its Memorandum of Conclusions [R. 321-360].

In this opinion the court first reviewed the proceedings had at the oral argument on the motions directed at the First Amended Complaint, with particular reference to the court's direction and the agreement of appellant's counsel that the transactions be stated separately [R. 321-326]. The court then analyzed the allegations of the Second Amended Complaint, enumerating the five separate and distinct transactions therein alleged. The court referred to the plaintiff's use of conclusions of law in charging fraud and illegality, and her failure to set forth with particularity the ultimate facts constituting the alleged fraud and illegality [R. 336-337] (specified as error, Point I of "Points Upon Which Appellant Intends to Rely on the Appeal" [R. 492], Br. p. 35). The court remarked that the order of the Securities and Exchange Commission, upon which plaintiff relied to justify her delay in

suing, warranted the conclusion that if the bar of the statute of limitations or of laches was to be avoided, it would be necessary for plaintiff to plead other facts [R. 350-351] (specified as error, appellant's Point II [R. 492], Br. p. 36).

The court further pointed out that the pleading was replete with surplusage and repetitions, as well as legal conclusions, including numerous recitals more or less general, vague and indefinite, charging various acts of wrongdoing [R. 353] (specified as error, appellant's Point III [R. 493], Br. p. 37). There were further comments which will be noted in the argument.

The court then made specific rulings, as follows:

- [1] “* * * that each claim founded upon a separate transaction, as hereinbefore outlined, should have been stated in a separate count, and that such separation would have facilitated the clear presentation of the matters set forth. (See Rule 10b, FRCP)” [R. 355]

(citing *Bowman v. Wohlke*, 166 Cal. 121, 135 Pac. 37 [R. 355-357]).

- [2] “* * * that before it can be held that plaintiff has a cause or causes of action against the defendants or any of them, and likewise before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint.” [R. 358]

(specified as error, appellant's Point IV [R. 493], Br. p. 38).

[3] That appellees were entitled to be informed as to certain matters [R. 358-360]. The details of these last rulings may be more logically stated in the argument, where we will also give record references to the items of the motions for more definite statement to which said rulings were responsive.

After making these rulings, the court concluded as follows:

“Plaintiff has amended her complaint twice. In view of this fact, and of the other circumstances and conditions previously noted, we have concluded that each and all of the respective motions to dismiss should be granted. [Specified as error, appellant’s Point V [R. 493], Br. p. 39.] We have further concluded that the appropriate procedure would be, instead of granting plaintiff unconditionally the right to file another amended complaint, to prescribe the conditions upon which she may apply for leave to file a third amended complaint.” [R. 360.]

**Minute Order Granting Motions
to Dismiss [R. 320].**

On the same day, namely, April 16, 1943, the court made its minute order reading as follows:

“For the reasons set forth in the memorandum of conclusions this day filed, it is ordered that each and all of the motions filed on behalf of the respective defendants to dismiss the second amended complaint be granted. [Specified as error, appellant’s Point VI [R. 493-494], Br. p. 41.] It is further ordered that on or before June 1, 1943, plaintiff may file application for leave to file a third amended complaint, provided that such application have attached thereto her proposed further amended pleading, and also be accompanied by a memorandum of supporting points and authorities, provided further that at least ten days

notice shall be given of the hearing of such application.” [R. 320.]

Notice of the order granting motions to dismiss and of the permission granted appellant to apply for leave to file (upon conditions) a further pleading was promptly given [R. 361]. Appellant thus had approaching one and a half months after notice within which to make application for leave to file a third amended complaint.

Judgment of Dismissal [R. 448-451].

Appellant, however, did not apply for leave to file a third amended pleading, nor did she ask for any extension of time therefor, and accordingly the time expired without action on her part [R. 450]. Thereafter, on June 9, 1943, the court entered its judgment of dismissal [R. 448-451]. (Specified as error, appellant’s Point VII [R. 494], Br. p. 42.)

Summary of the Argument.

1. The stockholder plaintiff is not suing in her own right—she is asserting the corporation’s alleged cause of action. She acts in a capacity analogous to that of guardian *ad litem* and is peculiarly subject to the control of the court and to rules designed to prevent an abuse of her privilege. These basic principles have been overlooked in appellant’s opening brief.

2. The action was properly dismissed because of appellant’s failure to state separately the claims founded on separate transactions and to obey the direction of the court in that respect.

The claims pleaded in the First and Second Amended Complaints are founded on separate transactions.

Separate statements of each of the five claims would facilitate the clear presentation of the matters set forth.

3. The Second Amended Complaint fails to state a claim because, among other reasons, it clearly appears on the face thereof that each and every cause of action attempted to be set forth therein is barred by the statute of limitations.

If any of the five transactions gave rise to a cause of action, such cause of action arose more than three years before this action was filed.

The Second Amended Complaint does not allege sufficient facts to excuse the failure to commence this action within the statutory period of three years.

If appellant made discovery of the fraud complained of from the order of the Securities and Exchange Commission, then her action is barred as against all defendants as to the third and fourth transactions and as against certain of the defendants as to all of the transactions.

The situation of the appellees Elkus, Hoelscher, Smith, Walston, Clifford Hoffman, Claire Giannini Hoffman and Walston & Co.

4. According to the allegations of the Second Amended Complaint Transamerica's corporate subsidiaries were indispensable parties defendant. The complaint was defective in this respect.

5. The language of the Second Amended Complaint is vague, general and indefinite, and the gravamen of its charges consists of conclusions of law or of the pleader. Accordingly, the Second Amended Complaint fails to state a claim against appellees.

6. Appellant's contention that, in passing on the statute of limitations, the trial court considered as evidence matters *dehors* the Second Amended Complaint is without support in the record.

ARGUMENT.

I.

The Stockholder Plaintiff Is Not Suing in Her Own Right—She Is Asserting the Corporation's Alleged Cause of Action. She Acts in a Capacity Analogous to That of Guardian *ad Litem* and Is Peculiarly Subject to the Control of the Court and to Rules Designed to Prevent an Abuse of Her Privilege. These Basic Principles Have Been Overlooked in Appellant's Opening Brief.

It is a truism that in stockholder's actions the plaintiff is not enforcing her own right. She stands in the shoes of the corporation for whose benefit the suit is brought. The corporation is the real party plaintiff.⁸

The plaintiff's position is analogous to that of a guardian *ad litem* and is peculiarly subject at all times to the control of the court. Under the decisions generally and in the Federal courts by rule (23(c)), she may not voluntarily dismiss or compromise the action without specific court approval.

The foregoing principles are amply sustained by the authorities, a few of which are here quoted:

Smith v. Lewis, 211 Cal. 294, 298, 295 Pac. 37:

"And a stockholder suing on behalf of the corporation, as in this case, has no greater right or standing as plaintiff than the corporation would have had if the corporation itself had been plaintiff. The stock-

⁸The amount for which plaintiff seeks recovery in behalf of the corporation, not her own beneficial interest, determines the jurisdictional amount in Federal actions (*Johnson v. Ingersoll*, 63 F. (2d) 86).

holder stands in the shoes of the corporation. He is the mere nominal plaintiff and the corporation is the real party in interest and if the corporation is not in position to attack the transaction, the stockholder may not. (Turner v. Markham, 155 Cal. 562 [102 Pac. 272]; 6 Cal. Jur., p. 865, and cases cited.)”

Whitten v. Dabney, 171 Cal. 621, 624-625, 154 Pac. 312:

“But no one of the individual wrongs of any of the stockholders is subject to redress in this action. Plaintiffs are allowed to prosecute this action by virtue of their stockholders’ relationship to the corporation, but only for the purpose of redressing wrongs and impositions which the corporation itself had suffered. (Turner v. Markham, 155 Cal. 562 [102 Pac. 272].) These stockholders, as plaintiffs, therefore, occupied a strict fiduciary relationship to the corporation whose interests they were representing. Their position may not inaptly be compared to that of a guardian *ad litem*, to which consideration we will later return.”

In *Denicke v. Anglo California Nat. Bank of San Francisco* (C. C. A. 9), 141 F. (2d) 285, the appeal was from an order of the trial court made over the objection of the plaintiff stockholders approving a compromise and directing a dismissal. Plaintiffs appealed and the judgment was affirmed. The court said that the stockholder-plaintiff’s

“position in the litigation is assimilated to that of a guardian *ad litem* with power in the court, not in the stockholder, to compromise the rights of the real party in interest, which is the corporation itself, *Whitten v. Dabney*, *supra*; *Loeb v. Berman*, 217 Cal. 716, 20 P. 2d 685; *Russell v. Weyand*, 5 Cal. App. 2d

259, 42 P. 2d 381. We are not aware of any federal law to the contrary, and in the present circumstances we think it appropriate if not obligatory on us to apply the local rule."

141 F. (2d) 288.

A stockholder has no vested right to represent the corporation. Rather it is a privilege dependent upon procedural statutes or rules.

Perrott v. United States Banking Corporation
(D. C. Del.), 53 F. Supp. 953, 956:

"Rule 23(b) puts in issue 'the authority of the plaintiff to maintain' his complaint. Cf. *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 34, 21 S. Ct. 251, 45 L. Ed. 410. It seems to me the rule does not go beyond procedure. The action is to recover for a wrong suffered by the corporation. Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court. It is the same as the minor who is struck by the bus. Procedurally, the child is unable to seek redress for the wrong done him in his own person. This does not, however, affect his right of action. Procedural remedies are available by the appointment of a next friend, a guardian *ad litem*, or a trustee to prosecute the cause of action. The criticism that federal courts will not be dispensing the same justice that could be obtained in a state court in stockholders' derivative actions if Rule 23(b) is applied when in conflict with the state rule, ignores one of the original purposes of promulgating the rule and the evils it attempts to destroy. Cf. *Moore*, op. cit., pp. 2246-2253, 2250-2253, 2265."

Klum v. Clinton Trust Co. (N. Y. S. C.), 48 N. Y. S. (2d) 267, 268, is in accord. This case holds that a recently enacted New York statute which, like Rule 23(b), precludes a stockholder from maintaining an action in behalf of the corporation on account of transactions occurring before he became a stockholder, is procedural and applicable to pending actions.⁹

But in order that the privilege of representing the corporation may not be abused, the courts by rule or decision have placed conditions and limitations upon the stockholder. None of the courts has been stricter in this regard than the Supreme Court of the United States. The rules laid down with particularity in *Hawes v. Oakland*, 104 U. S. 450, 460-461, and there expressly made applicable to all stockholder's actions, whether involving fraud or not, were carried into Federal Equity Rule 27 and were readopted without substantial change as Rule 23(b), which reads as follows:

“(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise

⁹The court pointed out that “While a stockholder's derivative action may serve a useful purpose, it is very often grossly abused and utilized for reasons disconnected with the interest of the corporation.” 48 N. Y. S. (2d) 268.

have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

As already pointed out, plaintiff is the owner of 57 shares of the capital stock of Transamerica [R. 146], or slightly less than 1/2000th of 1% of the outstanding stock [R. 417]. Despite this small interest, if plaintiff complied with the conditions prescribed in Rule 23(b), F. R. C. P., she may nevertheless represent the corporation in respect to transactions occurring after she became a stockholder, but the court will require a very clear case to authorize the maintenance of the action.

In the well known and oft cited case of *Dannmeyer v. Coleman*, 11 Fed. 97, at pages 101-102, Circuit Judge Sawyer said:

"It is always a suspicious circumstance where a single stockholder, among a large number in a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim, *de minimis non curat lex*, very properly applicable; which would be the case in this instance but for the enormous, not to say astounding, amounts alleged upon information and belief, only, to have been fraudulently appropriated."

Other authorities support the proposition that where the stockholder's interest is insignificant when compared with the amount of stock of the corporation issued and outstanding, a very clear case must be made out before the court will authorize the suit.

In 4 *Thompson, Corporations* (2d Ed.), 1034, Sec. 4566, it is said:

“Where the holding is insignificant in amount the court will require a very clear case to authorize the action by the stockholder. Thus in a case where the act was not *ultra vires* and the case not clearly made out the court refused to interfere at the instance of one whose holding was only one hundred shares out of a capital stock of three hundred fifty thousand shares.”

The rule upon which we rely is clearly stated in *Trimble v. American Sugar-Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912, at 914, where Vice Chancellor Pitney (later Mr. Justice Pitney of the United States Supreme Court) speaking of a case where the plaintiff held $\frac{1}{7}$ of 1% of the whole issue of stock, said:

“Admitting that the holder of so small a part of the stock is entitled to be heard in this court for the correction of any real grievance he may suffer by the misconduct of the majority, yet I think it is the duty of the court to require that he should show a clear case by distinct affirmative allegations, even if they should necessarily include some of a negative character. In short, he must anticipate and exclude all reasonably probable conditions which may bar his relief.”

Throughout her brief appellant has overlooked these principles. She treats the case as if she were the owner of the alleged cause of action—as if she were here suing to enforce her individual rights.

Before answering appellant's argument we desire very briefly to call the court's attention to a matter occurring since the judgment below was entered and which we think furnishes additional grounds for the District Court's conclusion that appellant should state separately the separate and distinct transactions and should be required to make out a clear case against the appellees.

Until recently, with exceptions not here necessary to notice (see article, 31 *California Law Review*, p. 515), a stockholder could commence and maintain a stockholder's action without imposing any direct liability or detriment upon the corporate ward other than the disturbance in operations and in producing records and the giving of depositions by its officers and employees.¹⁰

¹⁰The District Court mentioned the fact that appellant is a resident of New York and that the principal office of Transamerica is in San Francisco in the Northern District of this state, and pointed out that many corporate records would need to be transported for the purpose of the trial. The court said that just why the litigation should have been filed in the Southern District was not quite clear [R. 346]. Counsel for appellant, commenting on this language, say that "the court's apprehension" in this regard "leaves us somewhat confused" (Br. p. 66). Counsel's statement overlooks the fact that appellant "occupied a strict fiduciary relationship to the corporation" (*Whitten v. Dabney, supra*, 171 Cal. 625) with a duty to place its interests foremost. In making the foregoing observation the trial court apparently had in mind the principle laid down in *DeLoach, et al. v. Crowley's, Inc.* (C. C. A. 5), 128 F. (2d) 378, 380 (quoted and relied on, Br. pp. 51-52), that "Expensive trial of meritless claims are sought to be avoided in the main by pre-trial and summary judgment procedures."

A stockholder ordinarily incurs no expense. It is a notorious fact that stockholder's derivative suits have become a fertile field of operations for attorneys proceeding upon the contingency alone of recovery and court award of exorbitant fees (see 39 *Columbia Law Review*, 784, 814). The stockholder plaintiff subjects the officers and directors of the corporate ward to litigation (vexatious if they are exonerated), but until recently at least it was generally thought that the limitations such as are found in Rule 23(b) and the ordinary rules of procedure obtaining in fraud actions (Rule 9(b)) were a sufficient protection to the individual defendants.¹¹

Recently, however, the legislatures of some of the states, recognizing the inherent injustice of the situation, have authorized recovery from the corporation by its exonerated officers, directors and employees of their expenses, including reasonable attorneys' fees.¹²

¹¹The record herein shows the existence of two other stockholder's actions, *Breakstone v. Giannini*, Los Angeles Superior Court No. 435131 [R. 79], and *Abrams v. Avery*, United States District Court, Southern District of California, No. 1393-H [R. 269]. A judgment of dismissal for want of prosecution was entered in the *Breakstone* case and an appeal is now pending. The *Abrams* action was dismissed, but no appeal was taken. See also *Greenberg v. Giannini* (C. C. A. 2), 140 F. (2d) 550, judgment of dismissal affirmed because of want of jurisdiction over Transamerica, an indispensable party.

¹²California Statutes, 1943, Ch. 934, Sec. 1 (Civil Code, Sec. 375, discussed in the body of the brief); Kentucky Acts, 1942, Ch. 40, Sec. 1; New York, General Corporation Law, 1941, Chap. 209 and Chap. 350, amending Sec. 61-A of the General Corporation Law. New York has recently enacted Sec. 61-B of the General Corporation Law (Laws of 1944, Ch. 668), which requires stockholders having less than five per cent of the outstanding stock, unless such stock has a market value of \$50,000 or more, to post bond to indemnify the corporation and its officers. This new section has been held constitutional and applicable to pending actions (*Shielcrawt v. Moffett*, New York Law Journal, May 17, 1944, p. 1905). 49 N. Y. S. (2d) 64

In 1943 California enacted such a statute (*California Civil Code*, Section 375, quoted in full in the Appendix, pp. 1-2). Under the principle decided by the Supreme Court of California in the recent case of *Sacramento Municipal Utility District v. Pacific Gas & Electric Company* (1942), 20 Cal. (2d) 684, 128 P. (2d) 529 (certiorari denied 318 U. S. 759), it seems reasonably certain that Section 375 is to be construed as creating a new substantive right in the director, officer or employee of the corporation and is applicable to stockholder's actions commenced in the Federal courts in California.¹³

Heretofore a stockholder's action in the courts in California, either state or Federal, was brought for the benefit of the corporation and if successful would result in a judgment in favor of the corporation, without however any direct pecuniary detriment to the corporation in the event the action were unsuccessful. Now, however, this has been changed, and the stockholder by prosecuting the action creates a contingent liability easily conceivable of considerable magnitude on her corporate ward.¹⁴

¹³In the case cited the California Supreme Court held that Section 526(b) of the Code of Civil Procedure, which gives to a municipal utility the right to recover its expenses, including attorney's fees incurred in its successful defense of an injunction action brought by a competing corporation, created a substantive right in the municipal utility which was entitled to recover even though the injunction action was instituted in the Federal courts.

¹⁴Even before the enactment of Section 375 of the California Civil Code, a California court had allowed the sum of \$60,000 as fees to the attorney of a single director because the director's acts had resulted in a direct and tangible benefit to the corporation (31 Cal. Law Review, p. 519). The author of this Law Review article thought that this theory (for which simple indemnity is substituted by said Section 375) was unsound and unsatisfactory, but that the award was reasonable (31 Cal. Law Review, p. 519).

The Federal Rules of Civil Procedure and the decisions of the courts generally, as we shall show, furnish ample authority for the action of the court below. Section 375 of the California Civil Code, while of course not affecting either the procedure, power or jurisdiction of the Federal courts, brings in practical considerations which cannot justly be ignored.

As the New York Appellate Division, referring to the recently enacted New York indemnity statute (Sec. 61-A) said:

“When we find a stockholder, owning fifty shares out of upwards of seven million shares, seeking to enforce alleged rights of his company, with the possibility of subjecting it to these large statutory costs and expense in the event of failure, we think it is the duty of the courts to require at least the statement of more than a mere general charge of wrongdoing before resort to equity may be had.”

Weinberger v. Quinn, 264 App. Div. 405, 35 N. Y. S. (2d) 567, 572 (affirmed without opinion, 290 N. Y. 635, 49 N. E. (2d) 131).

II.

The Action Was Properly Dismissed Because of Appellant's Failure to State Separately the Claims Founded on Separate Transactions and to Obey the Direction of the Court in That Respect. (Answering Appellant's Point Four, Br. pp. 97-111.)

Appellant's failure in her Second Amended Complaint to state separately the claims formed the basis of two attacks by appellees, (1) as one of the grounds of the motions to dismiss [R. 195; 219; 240; 257-258; 284-285; 298], and (2) as the ground for their motions for a separate statement of claims [R. 195-199; 220-222; 240-242; 258-261; 285-287; 298-301].

The District Court in its Memorandum Opinion held that the five claims should have been stated in separate counts and that such separation would have facilitated the clear presentation of the matters set forth [R. 355].

Rule 10(b) provides:

“* * * Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.”

Rule 41(b) provides:

*“For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. * * *”*

If the action of the trial court in directing plaintiff to make a separate statement of claims was proper under Rule 10(b), then the judgment of dismissal was correct under Rule 41(b).

Blake v. De Vilbiss Co. (C. C. A. 6), 118 F. (2d) 346.

In *Refior v. Lansing Drop Forge Co.* (C. C. A. 6), 124 F. (2d) 440, certiorari denied 316 U. S. 671, a stockholder's action was dismissed because of plaintiff's failure to proceed with the trial and his refusal to comply with the court's order continuing the case for one week upon the payment by plaintiff of \$100.00 in costs. The Circuit Court of Appeals said:

"Every litigant has the duty to comply with the reasonable orders of the court and, if such compliance is not forthcoming, the court has power to apply the penalty of dismissal."

124 F. (2d) 444.

**The Claims Pleaded in the First
and Second Amended Complaints Are
Founded on Separate Transactions.**

Appellant, in arguing that only one cause of action was pleaded in the Second Amended Complaint (Br. pp. 97-111), makes a contention which is equally applicable to the First Amended Complaint, namely—that she has pleaded one cause of action for an accounting. She asserts that in this action, "she appeals to equity to judicially establish a trust relationship and decree that appellees *account* for their derelictions" (Br. p. 110, italics appel-

lant's). She attempts to distinguish a case cited by the District Judge on another point by saying that it was "strictly a common law action" (Br. p. 109).

Officers and directors of a corporation are held to a fiduciary standard applicable to trustees (*Lofland v. Cahall*, 13 Del. Ch. 384, 118 A. 1, 3), and for some purposes they will be treated as "trustees" for the stockholders collectively, "which is only another way of saying that they are trustees for the corporation" (3 *Fletcher, Corporations* (perm. ed.), p. 151). Even if an individual stockholder were entitled to maintain an action for an accounting against the corporate officers, plaintiff is not here enforcing a personal right—she stands in the shoes of Transamerica (*Smith v. Lewis*, 211 Cal. 294, 298, 295 Pac. 37, quoted *supra*). Moreover, the trivial amount of appellant's interest in this case (less than \$50.00) would exclude the jurisdiction of the Federal courts.

The fact that since plaintiff is suing derivatively in the right of Transamerica she is perforce "in equity" does not convert a legal action into an equitable one. The essential character of the causes of action belonging to the corporation remain the same, whether brought by the corporation or by a stockholder suing in its behalf.

Cwerdinski v. Bent, 256 App. Div. 612, 11 N. Y. S. (2d) 208; affirmed without opinion, 281 N. Y. 782, 24 N. E. (2d) 475.

See also:

Dunlop's Sons Inc. v. Dunlop, 259 App. Div. 233, 18 N. Y. S. (2d) 818, 819;

Singer v. Carlisle, 26 N. Y. S. (2d) 172; affirmed without opinion, 26 N. Y. S. (2d) 320.

In *Cwerdinski v. Bent*, *supra*, the Appellate Division said:

“A shareholder is in no better position than the corporation, even though the complaint is addressed to the equity side of the court.”

11 N. Y. S. (2d) 210.

The Appellate Division then quoted with approval from authorities sustaining this proposition, including the following excerpt from *Morawetz on Corporations* (Sec. 271) as quoted in the opinion of Mr. Justice Lurton in *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 648, 649, 15 S. W. 448, 452:

“‘A suit of this character is brought to enforce the corporate or collective rights, and not the individual rights of the shareholders. It may therefore properly be regarded as a suit brought on behalf of the corporation, and the shareholder can enforce only such claims as the corporation itself could enforce. *Moreover, the essential character of a cause of action belonging to a corporation remains the same, whether the suit to enforce it be brought by the corporation or by a shareholder.* Thus a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action, as to limitations, etc., because a shareholder has brought suit in equity to enforce it on behalf of the company.’”

11 N. Y. S. (2d) 211.

If the suit had been brought by Transamerica, it is clear that the claims founded on the first, second and fifth transactions would not have been actions for an accounting.

While the pleader stigmatizes the salary agreement with Bancitaly Corporation as "pretended, fraudulent and fictitious" [R. 162], and asserts that the Board of Directors of Transamerica "without legal right or authority" caused Transamerica and its subsidiaries, etc., to acquire the assets of Bancitaly Corporation and to appear to assume as its own the "pretended, fraudulent and fictitious, salary agreement" [R. 162], the validity of agreements providing for incentive compensation is now too well settled (*Church v. Harnit* (C. C. A. 6), 35 F. (2d) 499, 501) to be successfully assailed as wholly void by any such allegations as those mentioned. And this is true even if it be assumed that, contrary to the usual rule (*Matthews v. Ormerd*, 140 Cal. 578, 583, 74 Pac. 136; *Patten v. Pepper Hotel Co.*, 153 Cal. 460, 467, 96 Pac. 296) Transamerica (or a stockholder standing in its shoes) may retain the assets of Bancitaly Corporation and yet denounce its obligation as wholly void. Whatever may be the theory, the claim founded on the first transaction, if brought by Transamerica or its subsidiaries, would not be a cause of action for an accounting, but merely a legal action for money had and received.

In *Cwerdinski v. Bent*, *supra*, the court said (11 N. Y. S. (2d) 210):

"The purpose of the first cause of action is to compel the parties who were the recipients of the bonuses to return to the corporation the difference between the sums actually received by them and the amounts which should have been paid under the bonus plan. In short, the first cause of action involves sums of money which these appellants, and other individual defendants, are said to have received wrongfully from the New Jersey corporation. Since that is so, the

corporation could have instituted an action for money had and received, and consequently no accounting would have been necessary.”

In the second or Walston & Co. transaction the amount sought to be recovered is equal to the amount paid to Walston & Co. from the funds of Transamerica and its subsidiaries for use as capital and as brokerage fees on business diverted [R. 171-172]. This second claim is not an action for an accounting.

Dunlop's Sons Inc. v. Dunlop, 259 App. Div. 233,
18 N. Y. S. (2d) 818, 819.

In this case plaintiff corporation brought an action against certain of its former officers for an accounting and the recovery of “profits” made by said officers in selling property to the corporaion at an excessive price. Plaintiff contended, and the trial court held, that the New York ten-year statute of limitations applicable to cases of accounting was controlling. Upon defendants’ appeal the order was reversed and the motion to dismiss granted. The Appellate Division said:

“What we have in this case is a claim for the return to the corporation of a loss suffered by the corporation. The amount of the loss is the same as the amount of the so-called ‘profit’ received by the defaulting officers and directors. The wrong done to the company is no different from the wrong done to a corporation when an excess salary is paid to an officer or when gifts are made to strangers or when bonuses are wrongfully paid. The exact amount of the loss is known. Though the pleader may call this loss to the corporation a ‘profit’ to the unfaithful fiduciary which ought to be ‘accounted for,’ the pleader’s characteriza-

tion of the resulting legal situation with the intention of producing the application of a particular statute of limitations is not binding in any way on the court. The wrong pleaded is not a claim for profits in the sense in which that term is properly used in stockholders' actions.

"Where bonuses are wrongfully paid, the six-year statute of limitations, Civil Practice Act, Sec. 48, is to be applied. *Cwerdinski v. Bent*, 281 N. Y. 782, 24 N. E. 2d 475. This court has held that the six-year statute applies also to payments of excess salaries and to the sale of stock by directors to the corporation at prices in excess of the market value. *Davis v. Cohn*, 256 App. Div. 905, 9 N. Y. S. 2d 881. We cannot distinguish the sale of stock by directors at a price in excess of the market value from the sale of a factory to a corporation under similar conditions."

18 N. Y. S. (2d) 820.

The rule announced in the *Dunlop* case has been applied to a stockholder's action (*Singer v. Carlisle*, 26 N. Y. S. (2d) 172, affirmed without opinion, 26 N. Y. S. (2d) 320).

The fifth or "Market" transaction, (*i. e.*, recovery for sums disbursed in soliciting purchases of Transamerica stock from the general public), is not an action for an accounting. At most it is merely recovery of damages for alleged waste of corporate funds (compare *Singer v. Carlisle, supra*).

The cases cited by appellant do not lead to a contrary conclusion.

In *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 859 (quoted Br. pp. 98-100), plaintiff was suing in his indi-

vidual right for an accounting by his partners. The case turned upon the proposition, the language of which is not quoted by appellant, to wit:

“Partners cannot sue one another at law for any breach of the duties or obligations arising from that relation. This can only be done in chancery by asking a dissolution and accounting, and, if damages accrue from any cause in such proceeding, they must be adjusted by some appropriate method in that tribunal.”

109 Cal. 132.

Observe that in the case at bar if Transamerica (or its subsidiary) were the party plaintiff, it could have sued at law as to the first, second and fifth transactions.

Moreover, as to these transactions if any accounting be necessary, it is merely incidental (*Wrightson v. Dougherty*, 5 Cal. (2d) 257, 262, 54 P. (2d) 13.)

In the case just cited the surviving partner brought an action against the administratrix of the deceased partner to recover certain of the partnership property. Plaintiff contended that since this involved partnership rights, the statute of limitations did not commence to run until the business of the co-partnership was substantially closed (5 Cal. (2d) 261). Overruling this contention and affirming judgments of nonsuit and on the pleadings in favor of the defendants, the Supreme Court held that the statute governing actions in replevin (Sec. 338, C. C. P.) was controlling. Quoting from a decision of the District Court of Appeal, the Supreme Court said:

“This action is essentially one of replevin. The demand for an accounting to determine what property actually belongs to the partnership assets does not

change the nature of the proceedings. The requested accounting is merely incidental to the demand for possession of the property.' ” (5 Cal. (2d) 262.)

In *Vernonia v. Supreme Coal & Ice Corporation*, 290 N. Y. S. 447 (quoted by appellant, Br. pp. 100-101), the stockholder's action involved a single contract and payments connected therewith.

The language of the Utah court in *Blake v. Boston Development Company*, 50 Utah 347, 167 Pac. 672 (quoted by appellant, Br. pp. 101 and 102), was *dictum* and the judgment of dismissal was affirmed because the plaintiff had joined causes of action against the corporation with a cause of action in its favor. The case has never been cited.

In the language quoted from *Kilbourn v. Sunderland*, 130 U. S. 505 (Br. pp. 102-103), the Supreme Court was sustaining the jurisdiction of the District Court *in equity*. The case was a true action for an accounting brought by principals against their agents. It does not seem to be particularly apt, since the fact that the stockholder plaintiff is in equity does not change the essential character of the action (*Cwerdinski v. Bent*, *supra*, and cases following it).

The pertinent language of Rule 10(b) is “Each claim founded upon a separate transaction * * *.” It is significant that plaintiff herself has referred to the five transactions as “transactions or series of transactions” [par. XX, R. 156].

An examination of the Second Amended Complaint discloses, we believe, that there were claims founded upon five separate and distinct transactions within the meaning

of Rule 10(b), as well as constituting separate claims or causes of action under code pleading. As the trial court succinctly declared,

“* * * plaintiff has sought to charge * * * the commission of several separate and distinct series of wrongs, each disconnected from all the others” [R. 354].

Passing over for later consideration the charges of conspiracy, it will be observed that the participants in each transaction are not “the same individuals” (*Blake v. Boston Development Co.*, *supra*—quoted by appellant, Br. p. 101). The defendant directors of Transamerica who became such not earlier than January 8, 1929, and ceased to be directors in 1931 [R. 158] had no personal participation or *ability* to participate in the second and subsequent transactions, none of which was initiated prior to 1932 [R. 169, 173, 178, 180]. Moreover, the theory of the third (Pacific Coast Mortgage Company) and the fourth (Mallory-Smith Syndicate) transactions is the use by the conspirators of their official positions with Transamerica Corporation and its subsidiaries and the confidential and special knowledge and information gained thereby [R. 177 and R. 179-180]. But the profits of the company and the syndicate for which recovery is here sought were not earned or collected prior to 1933 [R. 176 and 178]. Appellees who had ceased to be directors in 1931, of course, could have no official position which they could misuse to the detriment of Transamerica and its subsidiaries. Again, a number of the Walston partners do not appear to have been officers or directors of Transamerica or any of its subsidiaries *at any time*.

As to the recovery sought, each claim is separate and independent. In each of the claims set forth in her Second Amended Complaint appellant has alleged, first, a definite sum disbursed by Transamerica and its subsidiaries or profits received by appellees, and second, the amount of injury to Transamerica and its subsidiaries. The amount of injury alleged in any particular claim is in each case identical with the definite sum theretofore alleged in that particular claim, to wit: first transaction, sums disbursed under the salary agreement \$3,700,000.00 [R. 167], damages \$3,700,000.00 [R. 168]; second transaction, amounts paid and advanced to Walston & Co. for use as capital and as brokerage fees \$548,000.00 [R. 172], damages \$548,000.00 [R. 172]; third transaction, profits earned and collected by Pacific Coast Mortgage Company \$2,000,000.00 [R. 177], damages \$2,000,000.00 [R. 177]; fourth transaction, profits earned and collected by Mallory-Smith Syndicate, \$300,000.00 [R. 180], damages \$300,000.00 [R. 180]; and fifth transaction, items of expense incurred and substantial losses suffered in alleged manipulation of the market \$2,250,000.00 [R. 181], damages \$2,250,000.00 [R. 181]. The aggregate of these various amounts of injury is \$8,798,000.00. The prayer for judgment is for not less than \$8,798,000.00 with interest [R. 189]. The District Judge in his opinion mentioned these facts [R. 352-353], but appellant has not attempted to explain away their significance.

There is no overlapping among the transactions, no continuity. The fraudulent intent and purpose of appellees alleged in each of the five claims, namely, to enhance their personal and individual interests, do not make one transaction of the five.

As we already pointed out, some of the alleged wrongs are legal in their nature, some may be considered equitable. The theories involved are different. The alleged *causes* of action are different. The District Court made this plain in its opinion where, after analyzing the five claims, it said:

“* * * we see no escape from the conclusion that by her pleading plaintiff has sought to charge—as hereinbefore outlined—the commission of several separate and distinct series of wrongs, each disconnected from all the others. We are not persuaded that the evidence which, for example, might tend to prove the so-called fraudulent salary agreement or the alleged wrongs committed in carrying out the provisions thereof, would have any connection with the evidence pertaining to what has been described as the series of Walston and Company transactions, or would throw any light upon the Pacific Coast Mortgage Company dealings, or would be relevant to what has been referred to as the series of Smith and Mal-lory trust syndicate transactions, or would have any connection with the operations whereby it is claimed Transamerica sustained large monetary losses as the result of engaging in stock market manipulations.

Furthermore, we do not perceive upon what legal theory it may be held that under the facts alleged any one of the aforementioned series of transactions constituted a part of or was bound up with any one or more of the remainder.” [R. 354-355.]

Appellant criticizes this language, saying that the court disregarded the true sense of appellant’s action (Br. p. 108) and obviously confused the “thing amiss” with the several means with which it was accomplished (Br. p. 109). Appellant says:

“Merely because delinquent trustees use several methods or means to accomplish a common design,

with respect to trust property, does not, for the purpose of suit, divide their general wrong into separate claims, or causes of action.” (Br. p. 109.)

But appellant has not charged “delinquent trustees” with a “general wrong.” No single substantive wrong is recognized under California law merely because the defendants are “delinquent trustees.” This is made plain by the provisions of Section 427 of the *California Code of Civil Procedure*, which provides that:

“The plaintiff may unite several causes of action in the same complaint, where they all arise out of:
* * * Claims against a trustee by virtue of a contract or by operation of law; * * * The causes of action so united * * * must be separately stated
* * *.”

If separate and distinct transactions became a “general wrong” because perpetrated by “delinquent trustees,” there would be no reason for the foregoing provision of Section 427 of the Code of Civil Procedure.

Clearly there were five claims founded on separate transactions within the meaning of Rule 10(b). The cases decided under this rule amply sustain the ruling of the District Court in this regard:

Kuhn v. The Pacific Mutual Life Insurance Company of California (D. C. N. Y.), 37 F. Supp. 100 (“* * * several causes of action to recover divers sums, predicated upon different circumstances”);

Conner v. Southern Ry. Co. (D. C. Tenn.), 1 F. R. D. 410 (commingling of common law and statutory grounds);

- Chambers v. National Battery Co.* (D. C. Mo.), 34 F. Supp. 834 (action for libel and slander; under local practice the judge determines the law on one, and the jury the law on the other);
- American Foman Co. v. United Dye Wood Corp.* (D. C. N. Y.), 1 F. R. D. 171 (action for patent infringement, damages for unlawful appropriation of invention, and other relief);
- Ingenuities Corporation of America v. Trau* (D. C. N. Y.), 1 F. R. D. 578 (action based on unfair competition, unfair trade practices, fraud, deceit, conspiracy, infringement, violation of trade marks and violation of license contracts);
- Bicknell v. Lloyd-Smith* (D. C. N. Y.), 25 F. Supp. 657 (action by two plaintiffs severally holding corporate bonds to recover upon a contract of guaranty by defendants. The court said that the answer as to one plaintiff might be different from the answer to the other).

Appellant further contends that the charges of a continuing conspiracy [pars. XIX and XX, R. 150-156] result in a single cause of action (Br. pp. 109-110).

The contention here made by appellant is similar to that made by the plaintiff in *Bowman v. Wohlke*, *supra*, 166 Cal. 121, 135 Pac. 37, and overruled by the Supreme Court of California. In the case cited:

“the plaintiffs, after alleging that defendants conspired to do the acts complained of for the purpose of destroying the business of plaintiffs and of holding them up to contempt and obloquy, and exposing them to public hatred, contempt, and ridicule, alleged a series of acts on their part in pursuance of said conspiracy, * * *”

166 Cal. 122-123.

Defendants demurred specially upon the ground that "causes of action united in the complaint were not separately stated" (166 Cal. 127). The trial court overruled this demurrer and the case went to trial, resulting in a judgment for the plaintiffs for \$400.00 actual damages and \$3,000.00 exemplary damages. In its opinion reversing the judgment the Supreme Court thus states the theory upon which the plaintiffs attempted to sustain the judgment:

"The theory of counsel for plaintiffs is that by reason of the claim that all the acts were done in pursuance of a conspiracy, we have but a single cause of action stated in the complaint, a cause of action for damages for 'conspiracy,' and that any variety of wrongful acts, whether ordinarily capable of being united in a single action or not, may be so united if done in pursuance of a conspiracy." 166 Cal. 124.

The California Supreme Court, after examining and quoting from many authorities, including the case of *Green v. Davies*, 182 N. Y. 503, 75 N. E. 536, concluded that,

"The complaint alleged various causes of action for different torts, all committed, it is true, in pursuance of a single conspiracy, but each, nevertheless, giving rise to a separate cause of action for the injury caused by the particular wrongful act." 166 Cal. 126.

The language of the decision is so illuminating and in point that we quote it at length therefrom in the Appendix (pp. 3-6).

Appellant attempts to distinguish the case of *Bowman v. Wohlke*, *supra*, by saying that it is "strictly a common law action" (Br. p. 109). But as we have already shown, this remark is predicated upon the erroneous assumption

that because appellant is perforce in equity her position is different from that which would have been the case had Transamerica or its subsidiaries brought the action (*ante*, pp. 39-40).

Appellant cites a number of Federal cases involving criminal conspiracies in support of her contention that the directors who ceased to hold office did not thereby withdraw from the conspiracy (Br. pp. 103-106). She asserts that these decisions demonstrate that one may continue to be a conspirator "after his power to commit a corporate act is taken from him" (Br. p. 109). It will be unnecessary to examine these cases. As stated, each involved a criminal conspiracy in which the unlawful combination and confederacy is the gist of the offense (*Bowman v. Wohlke*, *supra*, quoted in Appendix, p. 4). In none of the cases cited by appellant was the *ability* of the defendants to continue to aid and abet the conspiracy dependent upon their retaining an official position. Moreover, even if a continuing conspiracy of all the directors has been sufficiently alleged, this would not convert five different claims into a single cause of action.

As the language quoted in the Appendix (p. 4) from *Bowman v. Wohlke*, *supra*, demonstrates, the allegations of conspiracy add nothing to the complaint.

"The averment of a conspiracy is immaterial, and could be proved without such averment, or, if averred, need not be proved."

Bowman v. Wohlke, *supra*, 166 Cal. 125, quoting from

More v. Finger, 128 Cal. 313, 60 Pac. 933.

The importance of the allegations of conspiracy is to connect a defendant with a transaction and charge him

with the acts and declarations of his co-conspirators (*Bowman v. Wohlke*, 166 Cal. 126).

Appellant's new "legal theory" [R. 479] (and see opinion below [R. 328]) furnished no justification for her refusal to obey the direction of the court.

**Separate Statements of Each of
the Five Claims Would Facilitate
the Clear Presentation of the
Matters Set Forth.**

Rule 10(b) requires a statement in separate counts of claims founded on separate transactions "whenever a separation facilitates the clear presentation of the matters set forth."

It appears from the language of this rule that the question as to whether a separation facilitates a clear presentation is one largely within the discretion of the trial judge, to whom the presentation is made, and that in the absence of a clear abuse of discretion the ruling of the trial judge should not be annulled on appeal.

At the hearing of the motions directed at the Second Amended Complaint, the trial court remarked that

"* * * the points which were raised in opposition could more clearly be considered and determined if in further amending the bill these controversies which were described in the first amended bill were pleaded separately, * * *" [R. 477].

In the afternoon of the same day, the court, speaking to counsel for appellant, said:

"It would make our discussion and our consideration of the questions clearer if you had made the segregation as you indicated that you would" [R. 480].

In its written opinion the District Court declared:

“Hence we conclude that each claim founded upon a separate transaction, as hereinbefore outlined, should have been stated in a separate count, and that such separation would have facilitated the clear presentation of the matters set forth. (See Rule 10b, FRCP.)” [R. 355.]

When the trial judge reached this conclusion he had already listened to four days of oral argument and had before him voluminous briefs filed both before and after the last oral argument [R. 449]. His determination therefore is analogous to a finding of fact, which under Rule 52(a) “shall not be set aside unless clearly erroneous.”

We suggest very briefly a number of reasons supporting the court’s conclusion.

1. Preliminarily it should be observed that, for reasons already stated, a separation into counts would not have been detrimental to appellant or to Transamerica. Such a separation would not have diminished or impaired the total amount for which it might be shown Transamerica was entitled to recover, for damages were separately alleged for each transaction. A separation into counts would not foreclose appellant from proceeding upon her theory that all of the acts were done pursuant to a continuing conspiracy. Without the averment of a conspiracy appellant is entitled to relief in behalf of Transamerica for the alleged injuries from such of the appellees as she can show have united or cooperated in the wrongs complained of (*Bowman v. Wohlke*, 166 Cal. at 125, quoted Appendix, p. 4).

2. The right of Transamerica to recover on appellant's suit involves *different legal principles* in the different transactions. The legal questions involved in the first transaction appear from the face of the Second Amended Complaint to be entirely different from the principles involved in the other transactions. Again the liability of the directors for alleged waste of corporate funds (the fifth transaction) involves legal principles entirely different from the alleged diverting of profitable business in the second transaction. The question whether the third transaction (Pacific Coast Mortgage Company) and the fourth transaction (Mallory-Smith Syndicate) were sufficiently pleaded in the original complaint, and if not whether the statute has run against these causes of action, is a matter which is not involved in the other three transactions.

3. A consideration of the sufficiency of the allegations to state a claim upon the first transaction would not be relevant to a consideration of the allegations as to whether a claim was stated in the second, and the same is true as to each of the claims. A statement of the claims in separate counts would have afforded defendants an opportunity to test in an orderly manner the sufficiency of each count as to each defendant. The trial court which had before it the voluminous briefs and heard the oral arguments so decided [R. 477].

4. The *evidence* tending to prove the claims as alleged would be different in each transaction. For example, evidence which might tend to prove the so-called fraudulent salary agreement or the alleged wrongs committed in carrying out the provisions thereof would not tend to prove any of the remaining transactions. The District Court pointed this out [R. 354-355]. Counsel for appel-

lant criticize this language (Br. pp. 110-111) asserting that the court predetermined the evidence. But this is not a just or valid criticism. The court did not predetermine any evidence; it properly assumed that the evidence offered by appellant at the trial would be within the issues tendered by her Second Amended Complaint. From the allegations of the Second Amended Complaint it is apparent that even if the evidence tended to prove a general conspiracy, nevertheless evidence tending to prove overt acts connected with one transaction would have no tendency to prove any other separate and distinct transactions.

Moreover, it has been held that affidavits may be submitted by the defendants to aid the court in determining whether a separate statement of claims would facilitate a clear presentation thereof (*Bicknell v. Lloyd-Smith* (D. C. N. Y.), 25 F. Supp. 657, 658). Affidavits submitted by appellees disclose evidence available as a defense to the claim founded upon the salary agreement which is not relevant to the claims on the other four transactions.¹⁵

In Point III about to follow we contend that each claim is barred by the statute of limitations and that appellant has not sufficiently excused her delay as to any of them (*post*, pp. 58 *et seq.*). The trial court so held [R. 358]. While we are convinced of the correctness of this conten-

¹⁵[R. 79-80], affidavit showing the pendency in the Superior Court of Los Angeles County of the case of *Breakstone v. Giannini* to recover on the salary agreement; [R. 271-281], affidavit of Hector Campana, that at the direction of the officers of Transamerica he sent to all stockholders of Transamerica a letter dated December 9, 1931 [R. 274-281]. This letter on its face disclosed credits of \$3,700,000.00 to A. P. Giannini under the salary agreement and the withdrawal by him of all except \$792,000.00 thereof [R. 275-276].

tion and of the ruling of the trial court sustaining it, nevertheless to meet the contingency that would arise in event this court concluded otherwise and held that although certain of the claims are barred others are not, we desire here to point out that such determination would emphasize the correctness of the ruling of the trial court requiring a separate statement of the various claims for, without such separate statement, a just, speedy and inexpensive determination of these claims and each one thereof, as required by Rule 1, would be impracticable if not impossible of accomplishment. That the judge of the trial court entertained this thought is manifest from his statement:

“In other words, you will have done it both the way you now think it ought to be done and the way, at least, I think it is necessary to segregate it; and that will afford an opportunity to the other side to make separate and distinct attacks upon [the] several counts in the bill.” [R. 470-471.]

The Second Amended Complaint incorporated five claims in a single count, contrary to the order of the court and the agreement of counsel for appellant. A separate statement would have facilitated a clear presentation of the matters set forth. Appellant's excuses for failing to state the claims separately, namely, that the action is a single cause of action for an accounting and that the alleged continuing conspiracy results in the statement of but a single claim, have been shown to be untenable. The order of the trial court directing separate statements was proper. Appellant's failure to comply and/or to apply within the time limited for leave to file a third amended complaint furnishes ample ground for support of the judgment of dismissal.

III.

The Second Amended Complaint Fails to State a Claim Because, Among Other Reasons, It Clearly Appears on the Face Thereof That Each and Every Cause of Action Attempted to be Set Forth Therein Is Barred by the Statute of Limitations.
(Answering Appellant's Part Two, Br. pp. 69-87.)

In support of their motion to dismiss for failure to state a claim, appellees urged that the alleged causes of action were barred by the statute of limitations and laches, and that appellant had not alleged sufficient facts to toll the statute.¹⁶

In its Memorandum Opinion the Court stated:

"In the light of the allegations and admissions in her pleading, and in view of the circumstances and conditions to which attention previously has been directed, we are persuaded that * * * before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint." [R. 358.]

Appellant contends that since, under Rule 8(c), it is provided that laches and the statute of limitations must be affirmatively set forth as a defense, a motion to dismiss under Rule 12(b) is not proper, and cites *Dirk Ter Haar*

¹⁶The record references to the motions to dismiss are as follows: A. P. Giannini, grounds (b) and (c) [R. 194]; L. M. Giannini, *et al.*, grounds 3 and 4 [R. 218-219]; Bank of America, etc., as Administrator, ground (4) [R. 239]; A. H. Giannini, *et al.*, grounds (b) and (c) [R. 256]; Elkus, *et al.*, grounds (1) and (2) [R. 284]; White, grounds (b) and (c) [R. 296-297]. The record references to the motions for a more definite statement are given later in the argument.

v. Seaboard Oil Company, 1 F. R. D. 598 (Br. p. 84). But the weight of authority is to the effect that where the bar of the statute appears from the face of the pleading, a motion to dismiss will lie.

Abram v. San Joaquin Cotton Oil Co. (D. C. S. D. Cal.), 46 F. Supp. 969, elaborately discussing the question at pp. 974-975;

A. G. Reeves Steel Const. Co. v. Weiss (C. C. A. 6), 119 F. (2d) 472, 476;

Wright v. Bankers Service Corporation, 39 Fed. Supp. 980;

Cramer v. Aluminum Cooking Utensil Company, 1 F. R. D. 741;

Barnhart v. Western Maryland Ry. Co., 5 Fed. Rules Service 103;

Pearson v. O'Connor, 5 Fed. Rules Service 104.

See also the discussion of this point by the editors of the Federal Rules Service, 671, which concludes as follows:

“If the bar appears on the face of the complaint, it may be raised either by motion or in the answer; if not, it will normally be pleaded affirmatively.”

In a stockholder's derivative suit, if the statute has run against the corporation, neither the corporation nor any stockholder may maintain the action.

Cwerdinski v. Bent, *supra*, 256 App. Div. 612, 11 N. Y. S. (2d) 208, affirmed without opinion, 281 N. Y. 782, 24 N. E. 475;

Wallace v. Lincoln Savings Bank, *supra*, 89 Tenn. 630, 15 S. W. 448. (Both quoted, *ante*, p. 40.)

If the statute has run against the plaintiff in such a suit, then the plaintiff may not maintain the action, although other stockholders may not be similarly barred.

Fleishhacker v. Blum (C. C. A. 9), 109 F. (2d) 543, 548, footnote 8.

The complaint shows on its face that each of the alleged causes of action is barred either as against the corporation, Transamerica, or against appellant as a stockholder thereof, with the result that the action may not be maintained.¹⁷

The applicable statute is Section 338, subdivision 4, of the California Code of Civil Procedure, as has recently been held by this Court in *Fleishhacker v. Blum*, *supra*, 109 Fed. (2d) 543, where it is stated:

“The applicable statute (Cal. Code of Civil Proc., Sec. 338, sub. 4) provides that an action for relief on the ground of fraud or mistake must be brought within three years, but that ‘the cause of action in such case (is) not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.’ ”

To the same effect see:

Pourroy v. Gardner, 122 Cal. App. 521, 10 Pac. (2d) 815.

Appellant has cited no California case, and no case outside of California involving a stockholder's derivative action, to the contrary. Appellant does contend that since

¹⁷Obviously if it should be held that any of the five alleged causes of action is not barred, but such alleged cause of action fails to state a claim the same result must follow. The failure of each alleged cause of action to state a claim is discussed in Point V, *post*.

Transamerica is a Delaware corporation (Br. p. 6), the statute of limitations and the doctrine of laches of the State of Delaware are controlling under the decision in *Erie R. R. Company v. Tompkins*, 304 U. S. 64 (Br. p. 81). But this contention is untenable under the ruling in *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 496, wherein the United States Supreme Court stated:

“* * * the prohibition declared in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, against such independent determinations by the federal courts, extends to the field of conflict of laws.”

The Supreme Court of California has stated on this subject:

“It is a principle of conflict of laws recognized in California that the barring of a claim by the statute of limitations is a procedural matter governed by law of the forum, regardless of where the cause of action arose.” (Citing cases.)

Biewend v. Biewend, 17 Cal. (2d) 108, 114, 109 Pac. (2d) 701.

An analysis of the allegations of the Second Amended Complaint will demonstrate:

1. That if any cause of action in favor of Transamerica arose from any of the five transactions set forth in said complaint, such cause of action accrued more than three years before the commencement of the action; and
2. That the Second Amended Complaint does not allege sufficient facts to excuse the failure to commence this action within the said period of three years.

We will discuss these matters in the order stated.

If Any of the Five Transactions Gave
Rise to a Cause of Action, Such Cause
of Action Arose More Than Three Years
Before This Action Was Filed.

The five transactions were:

1. The salary agreement transaction.
2. The Walston & Co. transaction.
3. The Pacific Mortgage transaction.
4. The Mallory-Smith Syndicate transaction; and
5. The Market transaction.

(For a brief statement of each of these transactions, as set forth in the First Amended Complaint, see pages 8 and 9 hereof; and as set forth in the Second Amended Complaint, together with the applicable references to the transcript, see page 16 hereof.)

According to the Second Amended Complaint, the Smith-Mallory transaction was complete in 1936, and the market transaction was entirely ended in 1937. Since this action was not commenced until April 16, 1941, it is obvious that it was commenced after the three-year period had expired, in so far as these transactions are concerned.

The allegations concerning the salary agreement are found in paragraphs XXVI to XXVIII [R. 162-168]. In so far as pertinent to the present discussion, it appears that prior to January, 1927, A. P. Giannini entered into a salary agreement with Bancitaly Corporation in and by which he was to receive five per cent of the net profits of said corporation in lieu of salary [R. 163]. Pursuant to said agreement there were credited on the books of Bancitaly Corporation sums aggregating approximately \$925,000.00 [R. 163]. On the 25th day of May, 1929,

the Board of Directors of Transamerica Corporation assumed the obligations of Bancitaly Corporation, including the liability under the salary contract [R. 162]. During the period from about the 5th day of April, 1929, to the first day of January, 1930, substantial credits were made pursuant to said contract, aggregating not less than \$3,700,000.00, upon the books of Transamerica Corporation [R. 165]. During a period commencing on or about the 5th day of April, 1929, the amounts of said credits were from time to time paid, the times of said payments being unknown to plaintiff, except with respect to a sum of approximately \$1,271,647.01, which was paid in unequal annual instalments commencing in the year 1930 and ending in the year 1939, the payment in the year 1939 amounting to \$13,346.28, and the payment in the year 1938 amounting to \$34,000.00 [R. 167]. The damage alleged to have been suffered by reason of these transactions was a sum not less than \$3,700,000.00 [R. 168].

If we were to concede that the allegations of appellant's complaint were sufficient to establish that the assumption of the agreement by Transamerica constituted a fraud, obviously the cause of action in favor of Transamerica accrued at the time of the assumption of said contract, and the making of the entries with regard thereto on the books of Transamerica. In such circumstances, Transamerica would have had the right to seek relief from the transaction and the results thereof. Appellant may argue that since some of the payments pursuant to such entries were made in 1938 and 1939, the cause of action did not accrue with regard to this transaction until the last payment had been made. This contention is unsound, as is demonstrated by the cases hereinafter cited. The gravamen of

appellant's cause of action on this count is the assumption by Transamerica of the alleged fraudulent salary agreement and the credit given on the books of Transamerica, and if appellant has a cause of action it arose and was complete upon such assumption and credit. The payments subsequently made were merely evidence of the damage arising from the fraudulent act. These damages could have been estimated prospectively. In this case the statute of limitations began to run either at the time of the perpetration of the alleged fraud or at the time of the discovery.

See:

Thayer v. Kansas Loan Co. (8th C. C. A.), 100 Fed. 901.

In that case, the plaintiff had purchased from the defendants certain mortgages upon fraudulent representations that the mortgagors were solvent, and that the mortgaged property was worth much more than the debts secured thereby. The defendant pleaded the bar of the statute of limitations. The plaintiff claimed that the limitation did not commence to run until the mortgages were foreclosed and the loss occasioned by the fraud was ascertained. In answer to this contention of the plaintiff, the Circuit Court of Appeals says at pages 903-904:

“The learned counsel for the plaintiff in error ingeniously claims that, as a false affirmation made by the party with intent to defraud the plaintiff is not actionable unless the plaintiff received or suffered damages thereby, the statute of limitations did not begin to run until after the foreclosure proceedings by the plaintiff had been concluded, and a sale of the premises made, as until then he could not tell what his damages, if any, would be by reason of the deceit

and fraud of the defendants. While it is true that no action for deceit will lie unless the party defrauded has been damaged thereby, yet it does not follow that the amount of damages must first be ascertained by judicial proceedings, before the statute of limitations is set in motion. We are, in effect, asked by the learned counsel for the plaintiff in error to add to the statute so as to make it read:

‘The cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud and the ascertainment by the plaintiff of the loss sustained by him by reason of the transaction.’

Courts are compelled to indulge in a good deal of judicial legislation, but it is never done to the extent and in the manner here suggested. It is commonly confined to cases of first impression, and does not invade fields already fully covered by express legislative enactment. *The contention that the statute begins to run, not from the discovery of the fraud, but from the judicial ascertainment of the amount of the loss sustained by the fraud, is not tenable. Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 537, 32 L. Ed. 953; *Jones v. Lemon*, 26 W. Va. 629; *Bennett v. Worthington*, 24 Ark. 487; *Murray v. Railway Co.*, *supra*. The plaintiff’s causes of action set forth in all the counts except the second are clearly barred by the statute of limitations.”

See also:

Agee v. Virden Packing Co., 15 Cal. App. (2d) 691, 694, 59 P. (2d) 1058,

where the Court said:

“The contention plaintiffs make in support of their appeal is that in cases of fraud the cause of action

accrues at the time of rescission and not at the time of the discovery of the fraud; and that consequently since the action herein was commenced only ten days after rescission, it was not barred by the statute. Such, however, is not the law. Both by statute and judicial decision it has been long since declared that a cause of action for fraud accrues immediately upon the discovery of the facts constituting the fraud (subd. 4, sec. 338, Code Civ. Proc. * * *).

Greenberg v. Du Bain Realty Corp., 27 Cal. App. (2d) 111, 116-117, 80 P. (2d) 537;

Sanders v. Sanders, 117 Cal. App. 231, 234, 3 P. (2d) 599;

Bradbury v. Higginson, 167 Cal. 553, 557-558, 140 Pac. 254;

Note 110 A. L. R. 1178.

Clearly, the consummation of the alleged fraud arising out of the salary agreement was complete at the time the entries were made and at that time a cause of action arose. The Second Amended Complaint alleges that:

“During the period of time commencing on or about the 5th day of April, 1929, and ending on or about the first day of January, 1930 * * * said defendants and persons * * * caused said defendant and its corporate subsidiaries, departments and instrumentalities, to make and enter certain purported, false, fraudulent and fictitious, credit entries in favor of the defendants, Amadeo P. Giannini and L. M. Giannini, and the aforesaid Virgil D. Giannini (now deceased), in substantial sums aggregating not less than Three Million, Seven Hundred Thousand Dollars (\$3,700,000.00) upon the corporate records

and books of account of said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities, as purported liabilities thereof * * *.”

Thus it appears that this action, commenced on April 16, 1941, was commenced long after the three-year period had expired, because the entries of the credits were complete by January 1, 1930, eleven years before this action was commenced.

The allegations respecting the Walston & Company transaction are that this company was formed on December 17, 1932, when Transamerica and its subsidiaries were actively engaged in a profitable investment and brokerage business [Par. XXX, R. 169-170]. Payments are alleged to have been made to Walston & Company in the years 1933 to 1938 [R. 171-172]. The theory of this cause of action appears to be that profitable business of Transamerica and its subsidiaries was transferred to Walston & Company. The business was transferred or diverted late in 1932 or early in 1933 [R. 169-170], and the three-year statute has run against this transfer. The “substantial, profitable investment, security and brokerage business” [R. 169] of Transamerica and its subsidiaries necessarily had ceased to exist before 1938. When the statute ran against this transfer of business, all right of Transamerica or stockholders acting in its behalf to recover brokerage payments was cut off. Thenceforward the situation is no different from any case where a corporation hires a brokerage firm to act as its securities broker. Since prior to 1938 the statute had run against the transfer of business, the mere fact that in 1938 some part of the brokerage fees was alleged to have been paid

does not give rise to a cause of action. There are no allegations that the fees were exorbitant or anything more than the charges usually made for brokerage services.

The allegations that sums were also advanced to Walston & Company for use as capital “and other purposes” [R. 172] is too general to state a claim. The payment of these sums have no apparent relation to the alleged transfer of business, which is the foundation of plaintiff’s claim. No reference is made to the payment of these sums in Paragraph XXXIII [R. 173] in which the concealment of the earnings and profits of Walston & Company is alleged.

In respect to the third transaction recovery of profits of the Pacific Coast Mortgage Company (formerly Bankitaly Mortgage Company) it is alleged that the profits sought to be recovered “were earned and collected” during the years 1933 to 1938 [R. 176-177]. The foundation of this claim is that in 1932 Transamerica and its subsidiaries advanced moneys to defendants to purchase Bankitaly Mortgage Company, a subsidiary of Transamerica, and also moneys to enable Bankitaly Mortgage Company (Pacific Coast Mortgage Company) to engage in stock speculation [R. 174-175]. Assuming that said payments and advances and the acquirement of the mortgage company were “without legal right or authority” [R. 174-175] the statute has run against this transaction. Before 1938 (the last year in which profits were earned and collected by the mortgage company for which recovery is here sought) the right of Transamerica and its stockholders to complain of the 1932 transactions had become barred by the statute of limitations. The unqualified ownership of the mortgage company became vested in its stockholders free of any claim on the part of Transamerica or

its stockholders. The profits earned and collected in 1938 were but incidents of this ownership and any right to recover these profits is likewise barred. (Cal. Civ. Code, Section 3540.)

At most the defendants became no more than constructive trustees of the mortgage company in 1932 and the statute began to run immediately.

Bainbridge v. Stoner, 16 Cal. (2d) 423, 429, 106 P. (2d) 423;

Bell v. Bayly Bros., Inc., 53 Cal. App. (2d) 149, 158-159, 127 P. (2d) 662.

It therefore appears that each of the five actions set forth in the Second Amended Complaint occurred more than three years prior to the commencement of the action.

**The Second Amended Complaint
Does Not Allege Sufficient Facts
to Excuse the Failure to Commence
This Action Within the Statutory
Period of Three Years.**

It is well established that where an action based upon fraud is brought more than three years after the occurrence of the alleged facts constituting the fraud, as is the case here, it is incumbent upon the plaintiff to allege *with particularity*

“when it [the discovery] was made, what it was, how it was made, and why it was not made sooner.”

Wood v. Carpenter, 101 U. S. 134, 140-141.

The California cases are in accord:

Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 702, 703, 16 Pac. (2d) 268;

Lady Washington C. Co. v. Wood, 113 Cal. 482, 486, 487, 45 Pac. 809;

Haley v. Santa Fe Land & Improvement Co., 5 Cal. App. (2d) 415, 420-421, 42 P. (2d) 1078 (hearing by Supreme Court denied).

In the case last cited the defendant interposed a general demurrer based on the statute of limitations and a special demurrer for uncertainty in respect to the allegations designed to avoid the bar of the statute (5 Cal. App. (2d) 419-420). The trial court overruled the demurrers. A trial was had resulting in a judgment in plaintiff's favor for \$18,000. A new trial was denied and the defendant appealed. The District Court of Appeal, expressly recognizing the California rule (C. C. P. Sec. 452—similar to Rule 8(f)) that the "allegations [of a pleading] must be liberally construed, with a view to substantial justice between the parties" (5 Cal. App. (2d) 424) nevertheless reversed the judgment upon the ground that the trial court erred in overruling the general and special demurrer. The rules are succinctly stated, and we quote from the case:

"A party seeking to avoid the bar of the statute must aver and show that he used due diligence to detect the fraud; and if he had the means of discovery in his power he will be held to have known it. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite reasonable diligence. (*Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698 [16 Pac. (2d) 268].) He must *set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within*

that period. (Galusha v. Fraser, 178 Cal. 653, 547 [174 Pac. 311].) ‘Discovery’ and ‘knowledge’ are not convertible terms; and whether there has been a proper allegation as to a ‘discovery’ of the facts ‘constituting the fraud’ within the meaning of the statute of limitations is a question of law to be determined by the court from the facts pleaded. (Lady Washington Consol. Co. v. Wood, 113 Cal. 482 [45 Pac. 809].)”

The portion of this quotation which we have italicized also appears verbatim in *Consolidated R. & P. Co. v. Scarborough*, *supra*, 216 Cal. 703.

It will be observed that under the foregoing authorities there were imposed on appellant certain specific burdens, as follows: (1) to negative means of discovery; (2) affirmatively to show due diligence and that the delay was consistent with requisite reasonable diligence, and (3) a full statement of the circumstances of the discovery and of the times and circumstances under which the facts constituting the alleged fraud came to her knowledge.

Appellant has made a number of allegations in her Second Amended Complaint apparently designed to meet each of these burdens. The allegations are scattered and are somewhat repetitious. Without detailing them here, we give record references arranged according to each of the burdens above stated:

(1) Allegations to negative means of discovery: Transamerica’s books were intricate and involved and beyond comprehension of appellant [par. XXIX, R. 168-169]; and certain matters were concealed from or camouflaged on the books of Transamerica and its subsidiaries [par. XXIX, R. 169; par. XXXIII, R. 173; second subparagraph of par. XXXV, R. 176; second sub-

paragraph of par. XXXVII, R. 178-179; par. XL, R. 182-183].

(2) Allegations to show that appellant used diligence and that her delay was consistent with the requisite reasonable diligence: Until discovery April 27, 1939, she was ignorant and lacked information [par. XLI, R. 183], had full confidence in integrity of directors [par. XLI, R. 184], and no reason to suspect directors of wrongdoing [R. 185].

(3) Facts and circumstances of discovery: the order of Securities and Exchange Commission dated November 22, 1938, released under date of November 25, 1938, was called to appellant's attention on April 27, 1939, when for the first time she ascertained the facts contained in said order [R. 184-185]; thereupon she began to investigate and has diligently continued the investigation but has been unable to fully complete such investigation, and is still proceeding therewith [R. 186]. The order of the Commission was expressly referred to in the Second Amended Complaint [R. 185], was served on appellees [R. 446-447] and filed [R. 447], and appears in the record herein [R. 417 *et seq.*]. The order was thus incorporated by reference and was brought to the court's "attention by proper pleading" (*Hewitt v. Great Western Beet Sugar Co.* (C. C. A. 9), 230 Fed. 394, 398).

These allegations fall far short of alleging with particularity the requirements of *Wood v. Carpenter*, *supra*, and the California cases in accord.

1. The allegation that the books of Transamerica and its subsidiaries were kept in an involved system beyond the knowledge and understanding of appellant [R. 168-169] is irrelevant. Under Section 355 of the California

Civil Code, appellant had the right to inspect Transamerica's books of account "by agent or attorney" and the right to make extracts.

There are no allegations that the credits to A. P. Giannini under the salary agreement were concealed. On the contrary, appellant's complaint is that Transamerica and its subsidiaries were caused to make certain "credit entries" in favor of the Gianninis in sums aggregating not less than \$3,700,000.00 "upon the corporate records and books of account of said defendant, Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities * * *" [R. 165]. Apparently appellant had no difficulty in understanding Transamerica's method of bookkeeping with respect to this substantial item. Appellant's allegation is an implied admission that there was no concealment of the entries made under the salary agreement.

The allegation of paragraph XXXIII of the Second Amended Complaint that the interests of the defendants in Walston & Co. and the division of its profits were withheld from the books of Transamerica and its subsidiaries [R. 173] entirely misses the mark. Such entries would have no proper place in the books of Transamerica or its subsidiaries. There is a conspicuous absence of allegations that the brokerage fees paid and money advanced to Walston & Co. were withheld from the books of Transamerica or its subsidiaries. If, as the appellant alleges, Transamerica and its subsidiaries were actively engaged in 1932 in a brokerage business [R. 169], as a stockholder she was charged with notice of that fact.

Appellant, however, contends that a stockholder cannot be presumed to know facts appearing in the records and

books of the corporation and that failure to acquire knowledge of the wrongful acts of the corporate officers is not negligence, citing *Cahall v. Lofland*, 12 Del. Ch. 299, 305, 114 Atl. 224 (Br. pp. 81-82), *Cahall v. Burbage*, 13 Del. Ch. 299, 303, 119 Atl. 574 (Br. p. 82). These contentions are subject to the exception announced by the California District Court of Appeal in *Pourroy v. Gardner*, *supra*, 122 Cal. App. 521, 10 Pac. (2d) 815 (a stockholder's action). The court there said, at page 532:

"True, no duty rests upon stockholders to examine the books or minutes of the corporation, either constantly or at intervals, for the purpose of detecting illegal or fraudulent transactions committed against the corporation or its directors (*Reid v. Robinson*, 64 Cal. App. 46 [220 Pac. 676]); nevertheless where the circumstances are such as to put a person of ordinary intelligence and prudence on inquiry, or where there are gross laches in not making any effort to discover the real facts which might have been discovered by the use of slight diligence, the statute of limitations cannot be avoided, and the knowledge which thus might have been obtained is imputed as of the time of the commission of the fraud. [Citing cases.]"

The complaint alleges that in 1931 and 1932 two extraordinary changes occurred in the personnel of the board that should have excited appellant's interest and resulted, with the use of slight diligence, in the discovery of facts now complained of.

2. Appellant's allegation that she had no knowledge is a defensive allegation. Although the statute would have immediately commenced to run, if appellant had knowledge, her allegations of lack of knowledge of the

facts or of suspicious circumstances do not show the absence of a discovery. Appellant's allegations that until discovery she had full and complete confidence in the integrity and good faith of the directors and officers of Transamerica and its subsidiaries overlooks the fact that many of the defendants had ceased to be directors of Transamerica many years before the alleged discovery was made [R. 158-161], others such as most of the Wals-ton partners were strangers to Transamerica.

3. Appellant's allegations respecting her discovery are wholly insufficient. She alleged that on April 27, 1939, the proceeding before the Securities and Exchange Commission was called to her attention and that she "then and there and for the first time, ascertained the matters, facts, things, circumstances and charges contained in said order for hearing which had been released under date of November 25, 1938" [R. 184-185]. A printed official copy of said order was tendered for filing "for the purpose of showing the nature and extent of plaintiff's first discovery of suspicious circumstances concerning the wrongs of which complaint is made herein" [R. 185]. An examination of said order [R. 417 *et seq.*] discloses that it touched upon two matters, and only two matters, at all relevant to the charges contained in the Second Amended Complaint, viz.:

First. The order recited the Commission's belief that a credit had been entered in A. P. Giannini's favor on the books of a Transamerica subsidiary in 1930 in the amount of \$1,400,000.00; that of this sum all but \$792,000.00 had been paid Mr. Giannini by September, 1931, at which time counsel for the then existing management advised that further payment would be illegal; that subsequent to the change of management in 1932,

and in the years 1932 to 1936, inclusive, A. P. Giannini withdrew certain specified sums from said balance [R. 419-420]. The order further recited that it appeared to the Commission that failure to disclose those payments in the items calling for information with respect to remuneration paid to officers rendered said items materially misleading [R. 419-420].

Second. That corporate funds, expended in soliciting purchases of Transamerica stock, had been charged to Paid-In Surplus instead of to profit and loss, and that Transamerica's failure to reflect this item as a current expense with consequent reduction in Earned Surplus rendered both the balance sheet and the profit and loss statement of Transamerica materially misleading [R. 420-422].

There was no suggestion in the order that the credits to A. P. Giannini or the expenditures of funds were the result of a conspiracy. There was no intimation that the salary agreement was illegally assumed by Transamerica or its subsidiaries, or that payments thereunder were computed upon false, fictitious or inflated profits.

There was no suggestion in the order that the disbursements for the purpose of soliciting orders for the purchase of its capital stock held by Transamerica were unlawful or fraudulent. On the contrary the Commission's position was that the disbursements represented a "current expense *properly* chargeable to profit and loss" [R. 421].

There was nothing in said order in respect to the other three transactions, namely, the second *i.e.* Walston & Company transaction, the third *i.e.* Pacific Coast Mortgage

Company transaction, and the fourth *i.e.* Mallory-Smith transaction.

Appellant alleges that after reading the order she caused an investigation to be made which was still progressing [R. 186].

Assuming, as claimed by appellant, that she has alleged "discovery of suspicious circumstances with respect to wrongdoing by the corporate management" (Br. p. 86), nowhere in her Second Amended Complaint does appellant allege the discovery of the particular acts of wrongdoing upon which her complaint is based. She does not allege "the times and circumstances under which the *facts constituting the fraud* came to [her] knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within that period" (*Consolidated R. & P. Co. v. Scarborough, supra*, 216 Cal. 703; *Haley v. Santa Fe, etc. Co., supra*, 5 Cal. App. (2d) 420-421).

In arguing another point (Part One, Br. p. 67) appellant asserts that "it can reasonably be assumed" that she discovered the very facts and circumstances related in the pleading from the investigation made after her suspicions were aroused. The complete answer is that she did not make any such allegation in her Second Amended Complaint, nor did she state facts therein from which the court could determine whether the matters discovered as a result of such investigation could not reasonably have been learned at an earlier date. Although these defects in the Second Amended Complaint were plainly pointed out by the court, appellant did not apply for leave to file a third amended complaint containing the necessary allegations.

The District Court recognized that the only allegations of the facts and circumstances of discovery related to the matters contained in the order of the Securities and Exchange Commission and that unless said order contained recitals supporting appellant's charges of fraud, then there was no allegation of the times and circumstances under which the facts constituting the fraud came to appellant's knowledge. Accordingly, the court for the purpose of determining the nature and extent of appellant's discovery [see par. XLI, R. 185], examined said order [R. 347-350], and came to the conclusion, which we have already demonstrated to be correct, that the said order "contains no recitals supporting the charges she has made herein" [R. 350-351]. The court properly held that "before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint [R. 358]."¹⁸

We have so far confined our discussion to a showing that appellant (as distinguished from Transamerica) is barred by the statute of limitations and laches. We now proceed to show that the action is barred as to Transamerica and therefore as to appellant.

In order to avoid the bar of the statute as to Transamerica, it was necessary for appellant to show that the corporation was under a disability which prevented the statute from running (*Whitten v. Dabney, supra*, 171 Cal. 621, 629, 154 Pac. 312) and that Transamerica had no

¹⁸A connected point, Appellant's Part Five (Br. pp. 112-120) namely, that the court in passing on the statute of limitations considered as proven certain matters dehors the second amended complaint, will be answered under Point VI, *post*.

knowledge of the acts complained of. This appellant sought to do by alleging that "said defendants and persons" had complete control of the voting power of Transamerica stock, elected all of the individual members of its directors and completely controlled, dominated, determined, and directed the entire business policies and affairs of Transamerica [par. XXI, R. 156-157]. Considered apart from the allegations of conspiracy shortly to be noticed, these allegations are insufficient. The following authorities, while deciding the insufficiency of similar allegations as an excuse for failing to make demand upon the Board of Directors, are in point:

13 *Fletcher, Cyc. Corporations* (Perm. Ed.), Sec. 6008, pp. 321-322; 1943 Rev. pp. 401-402;

Baillie v. Columbia Gold Mining Co., 86 Ore. 1, 166 Pac. 965, 971;

Starke v. Boggs, 289 Ill. App. 461, 7 N. E. (2d) 369, 371.

Compare also:

Texas Company of Mexico v. Roos (C. C. A. 5), 43 F. (2d) 1, 15 (certiorari denied 282 U. S. 902).

The District Court properly ruled herein:

"Again, and for similar reasons the defendants are entitled to have plaintiff disclose whether she claims that all of them and also all of said forty-four other persons listed as having served at one time or another as directors of Transamerica, or if only some then which of them, held and exercised control of all of the issued and outstanding voting shares of capital stock of Transamerica, and also to set forth the ultimate facts upon which she bases such con-

clusions. Likewise, these litigants should be informed whether the pleader asserts that all of the defendants and all of the aforementioned forty-four other persons, or if only some then which of them, elected and completely dominated and controlled the several boards of directors of the latter corporation, and also should be given the ultimate facts upon which she bases these conclusions.” [R. 359.]¹⁹

Appellant made allegations in paragraph XIX of the Second Amended Complaint [R. 150] which, when read in connection with the allegations of paragraphs XXII and XXIII [R. 157-161] listing the names of all the directors of Transamerica and paragraph XLII [R. 187], had the effect of alleging that every director of Transamerica from October 11, 1928 (the date of Transamerica's incorporation) was a member of this conspiracy. But in paragraphs XXIV and XXV [R. 161-162], she made alternative allegations the last of which was that such of the directors, if any, who were *not* members of the conspiracy or a puppet or dummy either failed to discover any of the wrongful acts or “on the other hand, having discovered the same, at all times thereafter, knowingly and in complete disregard of his official duties,

¹⁹These rulings were responsive to the following items in the several motions for more definite statement: A. P. Giannini, Item D3 [R. 210]; L. M. Giannini, *et al.*, Item 26 [R. 227-228]; Bank of America etc., as administrator, Items (12), (13), (14), (15) and (16) [R. 245]; A. H. Giannini, *et al.*, Items 4 and 5 [R. 262-263]; Elkus, *et al.*, Item (6) [R. 288]; White, Item 26 [R. 307].

wholly failed to take action to redress or prevent the continuance of such wrongs * * * [R. 162]. The effect of this allegation is an admission that some of the directors of Transamerica may not have been either conspirators or dummies, but nevertheless had knowledge of the matters complained of and merely may have failed to take action.

It is established that if one director who was not under the domination or control of the wrongdoers obtained knowledge of the transactions complained of, the statute of limitations begins to run, because the knowledge of such director is the knowledge of the corporation.

Curtis v. Connly (1921), 257 U. S. 260, 66 L. Ed. 222.

To the same effect see:

Farmer v. Standeven (1938), 93 F. (2d) 959;

Hughes v. Reed (1931), 46 F. (2d) 435;

Grussemeyer v. Harper (1936), 187 Wash. 508, 60 P. (2d) 702;

Van Schaick v. Aron (1938), 10 N. Y. S. (2d) 550, 562.

In *Curtis v. Connly*, *supra*, 257 U. S. 260, at 264, the court said:

“Even if otherwise the statute of limitations would not have run, which we do not imply, knowledge of the facts by the new directors was knowledge by the bank, and none the less that according to the bill they in their turn were unfaithful. It is not alleged that

they conspired with the defendants whose case we are considering. They came to the board as the eyes of the bank. Anyone of them having notice was bound to do what he could to avert or diminish the loss. Indeed the bill seeks to charge one of them for not having done his duty. Notice to an officer, in the line of his duty, was notice to the bank. A single director like a single stockholder could proceed in the courts. *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381, 403.”

The trial court herein properly ruled:

“In addition the litigants ought to be advised whether plaintiff asserts that each and all of the defendants, or if only some then which of them, had knowledge of the facts which she claims constitute the alleged frauds etc., complained of, also whether such knowledge was actual or constructive, and when it is contended such knowledge was acquired.” [R. 359-360.]²⁰

“Finally and upon similar grounds we believe that the defendants are entitled to have plaintiff state whether she claims that each and all of the defendants, or if only some then which of them, were conspirators, also which if any of the defendants were

²⁰This ruling is responsive to the following items in the several motions for a more definite statement: A. P. Giannini, Item F3 [R. 211-212]; A. H. Giannini, *et al.*, Item 8 [R. 263]; Elkus, *et al.*, Item (9) [R. 289]; White, Item 64 [R. 314]. The ruling dealt with averments affecting the time when the statute of limitations began to run and is supported by *Mendola v. Carborundum Co.* (D. C. N. Y.), 26 F. Supp. 359.

puppets but not conspirators, also which if any of them were neither conspirators nor puppets but failed to discover the alleged wrongful acts complained of, and which of the defendants though neither conspirators nor puppets discovered such alleged wrongful acts and failed to take action thereon.” [R. 359-360.]²¹

We assume that appellant claims the right to make these alternative allegations under clause (2) of Rule 8(e). This clause in terms purports to permit a party to set forth alternative “statements of a claim” and provides that “the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.”

It seems plain that this portion of Rule 8 has no application to a stockholder’s action, where the charges involve fraud which under Rule 9(b) “shall be stated with particularity,” and in which the complaint must be verified. (Rule 23(b).)

Rule 8(e) (2) is a general provision. Rule 23(b) is a special rule dealing with stockholder actions. Under familiar rules of interpretation the specific rules control over the general, and the entire subject matter should be so construed and interpreted as to harmonize ap-

²¹This ruling is responsive to the following items in the several motions for more definite statement: A. P. Giannini Items C1 and C2 [R. 208-209]; L. M. Giannini, *et al.*, Items 55 and 56 [R. 232-233]; Bank of America etc., as Administrator, Item (16) [R. 245]; A. H. Giannini, *et al.*, Item 6 [R. 263]; Elkus, *et al.*, Item (7) [R. 288-289]; White, Items 55 and 56 [R. 312], 60 and 61 [R. 313].

parently irreconcilable provisions (*Townsend v. Little*, 104 U. S. 504, 512).

Rule 23(b), as we have already pointed out, is a readoption of the general law laid down by the Supreme Court of the United States in a series of decisions, of which *Hawes v. Oakland*, *supra*, 104 U. S. 450, 460-461, is the leading case.

Rule 23(b) requires that complaints in stockholders' actions be verified. This requirement necessarily excludes hypothetical and alternative allegations of the nature pleaded by appellant.

The Washington Code permits a defendant to set up inconsistent defenses, but, as pointed out by this court in *New York Life Insurance Co. v. Graham*, 92 F. (2d) 371, 380, the courts of Washington

"* * * have consistently adhered to the well-defined distinction which departs from the liberality of this rule by excluding pleas of contradictory facts which are so irreconcilable that both cannot be true and where the truth of one necessarily proves the falsity of the other."

The California rule permits the filing of inconsistent causes of action. However, in *Beatty v. Pacific States S. & L. Co.*, 4 Cal. App. (2d) 692, 697, 41 Pac. (2d) 378, hearing by Supreme Court denied, the District Court of Appeal said:

"We do not think, however, that the rule permitting the pleading of inconsistent causes of action in the

same complaint was ever intended to sanction the statement in a verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction. In short, the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which he purports to speak with knowledge under oath."

Moreover, we are not concerned at this point with appellant's "statements of a claim" (Rule 8(e)(2)), but rather whether in attempting to avoid the bar of the statute she has made "the fullest possible credible showing" (*Freeman v. Hopkins* (C. C. A. 9), 32 F. (2d) 756, 760 [certiorari denied 280 U. S. 575], quoting from *Robertson v. Burrell*, 110 Cal. 568 [42 Pac. 1086]). Appellant does not make this required showing in a complaint in which she has alleged even the possibility that there were directors with knowledge, who were neither dummies nor conspirators.

The hypothetical and alternative allegations of paragraphs XXIV and XXV were therefore not proper in a stockholder's action in the Federal court. These allegations not only imported ambiguity into the case as the trial court ruled, but they also destroyed the force of the allegations upon which appellant must necessarily depend to show that the claims were not barred as to Trans-america and therefore as to appellant.

If Appellant Made Discovery of the Fraud Complained of From the Order of the Securities and Exchange Commission, Then Her Action Is Barred Against All Defendants as to the Third and Fourth Transactions and as Against Certain of the Defendants as to All of the Transactions.

Appellant alleged in the Second Amended Complaint that she "ascertained the matters, facts, things, circumstances and charges contained in" the order of the Securities and Exchange Commission which was released on November 25, 1938 [R. 185]. She alleged further that this order first came to her notice on April 27, 1939 [R. 184], and she argues in her brief that the latter date is the time of her "first discovery of suspicious circumstances with respect to wrong doing by the corporate management" (Br. p. 86). Appellant failed to allege why she did not learn of the issuance of this order (a public record) at an earlier date, nor did she allege any facts excusing her failure in that regard. These defects were pointed out in the motions for a more definite statement [Items E2, E3—R. 211; Items 53 and 54—R. 232; Items 53 and 54—R. 312]. As a matter of law she was charged with notice of the order at the time it was issued. Under these circumstances the Second Amended Complaint is plainly insufficient (1) against all defendants as to the third and fourth causes of action and (2) against certain of the defendants as to all of the causes of action.

The third transaction (Pacific Coast Mortgage Company) and the fourth transaction (Mallory-Smith Syndicate) were pleaded for the first time in the First Amended Complaint [par. XXXVII-XLI, R. 50-56]. The original complaint, charging that certain of the defendants partici-

pated in pools and earned substantial profits by dealing in Transamerica stock [par. 29, R. 19], was not sufficient to toll the statute on the third and fourth causes of action (16 Cal. Jur. 547).

The original complaint did not name any fictitious defendants and in the First Amended Complaint the following defendants were made parties for the first time: Amadeo P. Giannini, as Executor of the Estate of Virgil D. Giannini, deceased,^{22,23} James A. Bacigalupi, A. H. Giannini, George A. Webster, C. R. Bell, W. W. Garthwaite, Louis Ferrari, Theodore M. Stuart, Herbert E. White, Claire Giannini Hoffman, and Walston & Co., a co-partnership.²⁴ The statute of course was not tolled as to any of these new defendants until the First Amended Complaint was filed.

John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 117 Pac. 690, 122 Pac. 835;

Craig v. San Fernando Furniture Co., 89 Cal. App. 167, 264 Pac. 784;

Jackson v. Lacy, 37 Cal. App. (2d) 551, 558, 100 P. (2d) 313.

The First Amended Complaint was filed on December 29, 1941 [R. 64]. This was more than three years after November 25, 1938, the date of the release of the order

^{22,23}An action against one as executor is a different cause of action from an action against the executor, individually. (*Sterrett v. Barker*, 119 Cal. 492, syl. 3, 51, Pac. 695.)

²⁴A suit against a partnership by its partnership name is different from a suit against the partners doing business under the partnership name. (*Maclay Company v. Meads*, 14 Cal. App. 363, 369-373, 112 Pac. 195, 113 Pac. 364.)

of the Securities and Exchange Commission, the reading of which by appellant on April 27, 1939, according to her theory, has fixed the date of discovery (Br. p. 86).

The release of the Commission is designated "Release No. 1950" [R. 417], and the opening words of the order are "For Immediate Release Friday, November 25, 1938" [R. 417].

The court will judicially notice that releases of the Securities and Exchange Commission are given wide publicity in the newspapers. Within a few days after November 25, 1938, appellant (a resident of New York [R. 146]) had available to her from the public press the information from which she claims to have made her discovery some five months later.

Where the matter is of public notoriety the statute begins to run from the time it was made public, and ignorance on the part of the plaintiff is of no avail to prevent the statute from starting to run.

In re Broderick's Will, 21 Wall. 503, 518-519;

Stone v. Winn, 165 Ky. 9, 176 S. W. 933.

In *In re Broderick's Will*, *supra*, the action involved the validity of Senator Broderick's will and sales had in the matter of his estate. The bill alleged that the complainants had no knowledge or information of Broderick's death, of the forgery of the will, of its presentation for probate, of the probate or order of sale, or any of the proceedings until the last of December, 1866, within three years of the filing of the bill (21 Wall. 507). Complainants, however, further expressly charged that it was a matter of public notoriety at San Francisco as early as

1861 that the will in question was not Broderick's will but was a forged and simulated paper (21 Wall. 519). It was held that the cause of action was barred by the California statute of limitations, now subdivision 4 of Section 338, Code of Civil Procedure.

The Supreme Court further held that the fact that plaintiffs lived in a remote and secluded region and had not heard of Broderick's death or of the sale of his property or of any events connected with the settlement of his estate, did not excuse their delay (21 Wall. 519).

In *Stone v. Winn, supra*, it appeared from the record that the claim of fraud was a matter of general public information in the county many years before and it was held that the claim was barred by the statute.

No attempt was made by appellant to excuse her failure to learn of the Commission's order of November 22, 1938, on the date it was released for publication, to wit, November 25, 1938. There are no allegations overcoming the presumption that the regular course of business was followed (California Code of Civil Procedure, Section 1963, subd. 20) and that the release was given the usual wide publicity or that any of the appellees prevented the release from coming to appellant's notice. Appellant does not even tender the excuse offered by Broderick's heirs, namely, living in a remote region; on the contrary, she alleges that she is a citizen and resident of the State of New York [R. 146], and her Second Amended Complaint is verified in the County of Bronx, State of New York [R. 190].

Appellant cites a number of cases in which courts have permitted recoveries after a lapse of considerable time (Br.

pp. 69-80), and she insists that the elements of laches are "inseparable from the merits of the case" (Br. p. 83).

The facts recited by the court in its opinion [R. 325-326] (which included the concession of appellant's counsel that the evidence would consist mainly of conflicting testimony of witnesses relying solely upon their recollection) were sufficient to warrant the court in requiring plaintiff to make a clear showing that the causes of action in favor of Transamerica were not barred by limitations or laches.

Appellant claims that the elements of laches or the absence thereof call for an investigation of all the facts and circumstances of the case (Br. p. 84). She says:

"In the present action, appellant desires the appellees to face a trial upon the merits of the controversy that, among others, the issue of 'laches' if properly and sufficiently presented, may be fairly tried and appellant's case not erased by academic interpretation upon 'motions to dismiss.'" (Br. p. 84.)

The difficulty with appellant's position is that the District Court by granting the motions to dismiss did not foreclose appellant from an opportunity to have the case tried on the merits. It pointed to the defects in the Second Amended Complaint and gave to appellant the opportunity to submit an application for leave to file a further amended pleading in which these defects would be cured. Appellant having elected to stand upon her Second Amended Complaint must show that it was free from the defects pointed out by the various motions and by the court's opinion. She has failed to do so.

The Situation of the Appellees Elkus, Hoelscher, Smith, Walston, Clifford Hoffman, Claire Giannini Hoffman, and Walston & Co.

None of these appellees was ever an officer or director of Transamerica or any other corporation involved in this case, except Elkus, who, as first alleged in the Second Amended Complaint, was a director from February 15, 1932 to April 6, 1932. Neither Claire Giannini Hoffman nor Walston & Co. was named as defendant until the First Amended Complaint was filed.

In neither the original complaint nor the First Amended Complaint was any of these appellees remotely connected to any of the transactions complained of except the Walston transaction. As to the Walston transaction, the allegations were substantially as follows:

(a) In the original complaint it was alleged merely that excessive commissions were paid to Walston & Co. by Transamerica, Bank of America and various unnamed affiliates and subsidiaries, and that this was accomplished by reason of the domination of the boards of directors of said corporations by A. P. Giannini, A. H. Giannini, L. M. Giannini, and John M. Grant.

(b) In the First Amended Complaint it was alleged that security business and funds were diverted from Transamerica to Walston & Co., and that this was done by A. P. Giannini and L. M. Giannini, and knowingly permitted by the directors of Transamerica.

(c) In the Second Amended Complaint these appellees for the first time were connected to and charged with having caused, participated in and profited from *all* of the transactions complained of, including the Walston transaction.

The Second Amended Complaint alleges entirely new and different causes of action against said appellees with the consequence that the statute of limitations continued to run in their favor until August 21, 1942, the date upon which the Second Amended Complaint was filed. (*Merchants National Bank of Santa Monica v. Bentel*, 166 Cal. 473, 137 Pac. 25; *Ronald Press Co. v. Shea*, 27 Fed. Sup. 857; *L. E. Witham Construction v. Remer*, 105 Fed. (2d) 371.) Appellant admits that the statute started to run on April 27, 1939 (Br. p. 86). This was more than three years prior to the filing of the Second Amended Complaint. Accordingly, by this admission of appellant, the action clearly is barred as to these appellees.

The foregoing discussion respecting the statute of limitations (Point III) makes crystal clear the necessity for separately stating the five transactions in separate counts and the correctness of the court's ruling so requiring. Different legal principles are involved in the application of the statute of limitations to these different transactions; the persons and periods of time involved are different; and the time of the commencement of the action is different as to some appellees respecting some of the transactions. We earnestly urge that all transactions are barred as to all appellees. But assuming, though not conceding, that some are not barred, it is obvious that the remaining claims are barred at least against some appellees. Thus it follows that if each transaction were stated in a separate count some of them, if not all, could be disposed of by the plea of the statute as to some, if not all, of the appellees, thus obviating the necessity of such appellees litigating such barred transactions. This was ample justification for the lower court's requirement of separate statements.

IV.

According to the Allegations of the Second Amended Complaint Transamerica's Corporate Subsidiaries Were Indispensable Parties Defendant. The Complaint Was Defective in This Respect. (Answering Appellant's Part Three (Br. pp. 88-96).)

In paragraph II of her Second Amended Complaint appellant alleged that Transamerica was engaged in numerous business enterprises and in the general business of organizing, etc., other corporations "as its corporate subsidiaries, instrumentalities and departments, in the operation of its said business enterprises." Then followed a list of twenty-six corporations, headed by Bank of America National Trust and Savings Association [R. 144-145]. None of these subsidiaries was named as a party defendant in the Second Amended Complaint, nor was any relief asked in behalf of any of them.²⁵

Appellant, in charging the alleged wrongful acts, in each instance used substantially the following language: "Transamerica Corporation, and its corporate subsidiaries, departments and instrumentalities," and in alleging who had suffered damages used the same phrase, usually adding the words "and shareholders." The phrase appears in the Second Amended Complaint at least fifty-four times. The

²⁵Bank of America National Trust and Savings Association was named as a defendant in the First and Second Amended Complaints in its capacity as Administrator-with-the-Will-Annexed of John M. Grant, Deceased [R. 24 and 146]. It had been named in its individual or corporate capacity in the original complaint [R. 4 and 5] as a defendant *against* whom relief was sought because a beneficiary of an alleged *ultra vires* contract of Transamerica [R. 13-15]. It was omitted as a defendant in its corporate capacity in the First Amended Complaint [R. 24-26] and in the Second Amended Complaint [R. 146].

principal allegations referred to, arranged according to the five separate and distinct transactions, are epitomized as follows:

1. *First transaction—the salary agreement*: “Said defendants and persons,” *i. e.*, directors of Transamerica not named as defendants, “caused said corporation [Transamerica] and *its corporate subsidiaries*, departments and instrumentalities, to acquire” the capital stock and assets of Bancitaly Corporation and to appear to assume the obligations thereof, including the salary agreement, and the credit entries thereunder [R. 162-163], to make credit entries in favor of A. P. Giannini, L. M. Giannini and Virgil D. Giannini (deceased) in the amount of \$3,700,000.00 [R. 165], and to pay said defendants \$3,700,000.00 [R. 166-167], by reason of which said defendants and persons, and particularly said Gianninis, “were from the funds and assets of defendants, Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities unjustly enriched to the serious and irremediable injury and detriment of said defendant corporation, and *its corporate subsidiaries*, departments, instrumentalities and shareholders” to the extent of at least \$3,700,000.00 [R. 167-168].

2. *Second transaction—diversion of business and payments and advances to Walston & Co.*: Said defendants and said persons “caused said defendant, Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities” to divert all of the investment, security and brokerage business thereof [R. 170], and to disburse from the funds, assets and property thereof sums amounting to not less than \$548,000.00 as brokerage fees and for use as capital, to Walston & Co. [R. 170-171].

The business so diverted at all times “belonged to Trans-america Corporation and *its corporate subsidiaries*, departments and instrumentalities” [R. 171-172]. Said defendants and said persons, particularly the Gianninis, were from the funds, assets and property of “Transamerica Corporation and *its corporate subsidiaries*, departments and instrumentalities, unjustly enriched to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, *its corporate subsidiaries*, departments and instrumentalities” in the sum of approximately \$548,000.00 [R. 172].

3. *Third transaction—Pacific Coast Mortgage Company*: Said defendants and said persons caused “Trans-america Corporation and *its corporate subsidiaries*, departments and instrumentalities” [R. 174, 175] “to pay and advance from the funds, assets and property thereof” \$1,500,000.00 to said defendants and persons to obtain control of Bankitaly Mortgage Company [R. 174-175] and \$1,500,000.00 to Bankitaly Mortgage Company [R. 175], later Pacific Coast Mortgage Company [R. 176]. Said defendants and said persons, through Pacific Coast Mortgage Company “and by and with the use of said defendants’ and persons’ positions with said defendant, Transamerica Corporation, and *its corporate subsidiaries*, departments, and instrumentalities, and the confidential and special knowledge and information gained thereby” engaged in speculative operations. Said Pacific Coast Mortgage Company “earned and collected” a profit aggregating not less than \$2,000,000.00, which was paid to and received by said defendants and said persons by reason of which each of them and particularly the Gianninis was unjustly enriched “to the serious and irremediable injury

and detriment of defendant Transamerica Corporation, and *its corporate subsidiaries*, departments, instrumentalities and shareholders” in the sum of approximately \$2,000,000.00 [R. 176-177].

4. *Fourth transaction—Mallory-Smith Syndicate:* Said defendants and said persons caused “Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities * * * to pay and advance from the funds, property and assets thereof” sums aggregating not less than approximately \$3,000,000.00 to the trustees, Smith and Mallory, for use as capital [R. 178]. Said defendants and said persons, through said trust syndicate “and with and by the use of their official positions with the defendant, Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities, and the special and confidential knowledge and information gained thereby” engaged in speculative operations and the syndicate “earned and collected” a profit of approximately \$300,000.00, which was paid to and received by said defendants and said persons, by reason of which each of them “was unjustly enriched to the serious and irreparable injury and detriment of the defendant, Transamerica Corporation, and *its corporate subsidiaries*, departments, instrumentalities and shareholders” to the extent of approximately \$300,000.00 [R. 179-180].

5. *Fifth transaction—expenditure of corporate funds in the market:* Said defendants and said persons caused “Transamerica Corporation, and *its corporate subsidiaries*, departments and instrumentalities” to engage in the business of manipulating and stirring the market for the capital stock of Transamerica, and “said defendant, Transamerica Corporation, *its corporate subsidiaries*, de-

partments and instrumentalities, incurred large items of expense and suffered substantial losses in the operation of such business” aggregating not less than \$2,250,000.00 “to the serious and irremediable injury and detriment of said defendant, Transamerica Corporation, *its corporate subsidiaries*, departments, instrumentalities and shareholders” in the sum of not less than approximately \$2,250,000.00 [R. 181].

The Second Amended Complaint prayed for an accounting and for a judgment “in the sums and amounts to which plaintiff and the defendant Transamerica Corporation may be entitled under the law and evidence, amounting in all to a sum not less than Eight Million, Seven Hundred and Ninety-eight Thousand Dollars (\$8,798,000.00), with proper legal interest thereon” [R. 189].

No relief was asked in behalf of any of the subsidiaries, no one of which was named a defendant.

Appellees attacked the Second Amended Complaint in respect to the allegations above mentioned, as follows:

(1) By their motions to dismiss upon the ground (among others) that *the subsidiaries were indispensable parties* [R. 194, ground (d); R. 218, ground 2; R. 239, ground (5); R. 256-257, ground (d); R. 297, ground (d)].

(2) By their motions for a *more definite statement* [R. 199-204; 223-227; 243; 302-306; 312-313].

In granting the motions to dismiss, the court did not specifically mention the ground that the subsidiaries were indispensable parties. The court, however, did refer to the fact that the Second Amended Complaint listed twenty-six corporations as subsidiaries of Transamerica, and ap-

pellant's allegations that as result of the alleged wrongful acts "both Transamerica and also in some greater or lesser degree, these numerous subsidiaries sustained substantial losses" [R. 357-358].

The court ruled that the allegations of the Second Amended Complaint relating to the subsidiaries were indefinite in some of the respects mentioned in the motions for a more definite statement [R. 199-204; 223-227; 302-306].

Specifically, the court ruled:

"The parties herein sued are entitled to be informed whether plaintiff claims that not only Transamerica but also each and all of these twenty-six subsidiaries, or if only some then which of the latter, acquired all of the capital stock and all of the assets and assumed all of the liabilities of Bancitaly corporation, including the alleged fraudulent salary agreement. Likewise, they ought to be apprised whether she asserts that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, entered upon their books credits and disbursed funds on account of the provisions of said agreement. * * * In addition they are entitled to be advised whether plaintiff claims that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, participated in the remaining series of alleged wrongful acts, including the so-called Walston and Company transactions, the Pacific Mortgage Company dealings, the so-called Smith and Mallory trust syndicate transactions and the stock market manipulations." [R. 358-359.]

At the outset it should be observed that appellant has apparently disavowed any intention of making the action

at bar a double derivative action (*i. e.*, an action by a stockholder of a parent corporation to recover judgment in behalf of a subsidiary for a wrong done the subsidiary). She does not pray for a judgment in favor of the subsidiaries [R. 189]. The subsidiaries have not been made parties, as would be necessary were plaintiff seeking judgment in their favor (*Goldstein v. Groesbeck* (C. C. A. 2), 142 F. (2d) 422, decided April 7, 1944; *Druckerman v. Harbord*, 22 N. Y. S. (2d) 595, 597). She has not alleged that she appealed to the boards, or any of the boards of directors of the subsidiaries, or any one thereof, neither has she alleged facts showing that such an appeal would have been unavailing. Such allegations are necessary (*Wachsman, et al. v. Tobacco Products Corporation of New Jersey* (C. C. A. 3), 129 F. (2d) 815, 817-818; *Warren Telephone Co. v. Staton*, 46 Ohio App. 505, 189 N. E. 660, 664).

The theory disclosed in appellant's brief on this point (Br. pp. 88-96) is that a judgment in favor of the parent corporation may be rendered upon rights of action of the subsidiaries. For each dollar paid *from the funds of a subsidiary* on account of the salary agreement or as brokerage fees or as expenses, and for each dollar of profit "earned and collected" by Pacific Coast Mortgage Company or by the Mallory-Smith syndicate [R. 177, 180] *on money loaned by a subsidiary*, appellant is seeking to recover a dollar (with interest) *for Transamerica*. This measure of damages, adopted in each of the five transactions as well as in the prayer [R. 189], and the contentions made by appellant in her brief, definitely show that appellant is seeking a judgment in favor of Transamerica, at least in part, for the alleged wrongs done to its subsidiaries.

Appellant's theory is stated in her brief as follows:

"* * * where a parent corporation owns, controls and operates corporate subsidiaries as departments, instrumentalities or agencies for *the conduct of its general business*, the assets and property of such corporate departments are, in equity, the property and assets of the parent corporation, and likewise the losses and debts of such corporate departments are equally the losses and debts of the parent corporation. Independent entities of the corporation departments and agencies are so far disregarded that each is considered a part of the *individual whole*." (Br. pp. 88-89, italics appellant's.)

This theory is based upon the allegations of paragraph II of appellant's Second Amended Complaint [R. 144] and four cases which we will shortly notice (Br. pp. 90-95).

Paragraph II of the Second Amended Complaint [R. 144] alleges that Transamerica has been at all times since its incorporation and now is "engaged in numerous business enterprises, including among others a general business involving and devoted to financial, investment, brokerage, insurance, and real estate enterprises, and also a general business of organizing, acquiring, holding, owning, controlling, maintaining and operating, other corporations and associations as its corporate subsidiaries, instrumentalities and departments, in the operation of said business enterprises, including the following corporate subsidiaries, departments and instrumentalities:" (listing twenty-six corporations).

A corporate "department" in the accepted sense of the word is not a separate entity, has no title or separate cor-

porate existence. The Second Amended Complaint, in alleging that the corporations listed are departments and instrumentalities of Transamerica, does not allege ultimate facts but mere conclusions of law.²⁶ Moreover, appellant's contention that Transamerica "operates corporate subsidiaries as departments, instrumentalities or agencies for *the conduct of its general business*" (Br. p. 88—italics appellant's) is not supported by the allegations of paragraph II, is contrary to other allegations appearing in the Second Amended Complaint and to allegations appearing in the original complaint, but omitted from the First and Second Amended Complaints.²⁷

One of the twenty-six corporations listed in the Second Amended Complaint [R. 144-145] (Bank of America National Trust and Savings Association) is a national banking association, and two (Occidental Life Insurance Company and Pacific National Fire Insurance Company) are insurance companies, operating as to internal affairs, under the jurisdiction of, and *requiring a special permit from*, the Comptroller of the Currency and the state insurance authorities, respectively. The court will judicially notice that Transamerica is not conducting either a banking or an insurance business (*Chavez v. Times-Mirror Co.*, 185 Cal. 20, 23, 195 Pac. 666).

Another subsidiary (Bancitaly Corporation) is shown by the allegations of paragraph XXVI of the Second

²⁶Appellees pointed out this defect in their motions for a more definite statement [Items A1 and A2, R. 199; Item 2, R. 243; Items 57 and 58, R. 312-313].

²⁷The court is entitled to consider the allegations of the earlier complaints. (*Wennerholm v. Stanford University School of Medicine*, 20 Cal. (2d) 713, 716, 128 P. (2d) 522.)

Amended Complaint to have been a corporation as early as April 13, 1927 [R. 164], more than a year prior to the incorporation of Transamerica on October 11, 1928 [R. 144], and according to the allegations of paragraph XXII of the First Amended Complaint, Bancitaly Corporation was organized on June 10, 1919 [R. 35].

Nowhere in her Second Amended Complaint does appellant allege that the subsidiaries are wholly owned by Transamerica. On the contrary, two of the subsidiaries listed, namely, Bankitaly Mortgage Company and Pacific Coast Mortgage Company [R. 145], are shown to be one and the same company [R. 176], and it is alleged in paragraph XXXV of the Second Amended Complaint that in 1932 A. P. Giannini, L. M. Giannini and Virgil D. Giannini acquired "the controlling interest in the capital stock of said Bankitaly Mortgage Company" [R. 174-175]. Also, it appears from the allegations of paragraph 23 of the original complaint, "That in or about July, 1937, Bank of America ceased to be a wholly owned or virtually wholly owned subsidiary of Transamerica as aforesaid, and thereafter Transamerica owned approximately 30% of the stock of Bank of America" [R. 15].

The allegations of the Second Amended Complaint upon which appellant relies to support her theory go no further than to show that Transamerica was a holding company of the same character as American Power & Light Company, the parent corporation of which the plaintiff in *Goldstein v. Groesbeck* (C. C. A. 2), *supra*, 142 F. (2d) at p. 424, was a stockholder and in whose right the plaintiff brought a double derivative action. In holding that a double derivative action was permissible, the Court of Appeals for the Second Circuit relied on the fact

that Section 51 of the Judicial Code (28 U. S. C., Sec. 112) had been amended by Congress (April 16, 1936, c. 230, 49 Stat. 1213) so as to permit a stockholder of a parent corporation to sue double derivatively and obtain jurisdiction over the subsidiaries who were indispensable parties (see Opinion, *Goldstein v. Groesbeck*, *supra*, footnote 3, 142 F. (2d) 426).

As we have pointed out, appellant has not brought a double derivative action. She claims the right to recover a judgment in behalf of Transamerica upon choses in action belonging to the subsidiaries (1) without making any of the subsidiaries a party and (2) without even specifying the subsidiary or subsidiaries injured in the five separate and distinct transactions.

Appellant cites four cases in support of her theory. Generally speaking, these cases hold that under the particular circumstances therein considered equity, in order to prevent a miscarriage of justice, would ignore the corporate entity of the subsidiary. All of the four cases appear to recognize, if not expressly state, the general rule that the corporate subsidiary does not lose its separate identity merely because all of its stock is owned by another corporation. In each case the court was of the opinion that the particular facts warranted a departure from the general rule. We will briefly analyze these four cases.

In *Kimberly Coal Co. v. Douglas* (C. C. A. 6), 45 F. (2d) 25 (Br. pp. 90-91), it was held that a state court judgment in favor of a lessor and against a parent corporation created an estoppel which precluded the lessor from recovering an additional amount (disclaimed in the state action) from a subsidiary on the same cause of action, although the subsidiary was not a party to the state

action. The commissary stock on the leased premises had been transferred by the parent to the subsidiary in exchange for the capital stock of the latter. It was conceded that the subsidiary was a mere instrumentality for the conduct of the parent's business (45 F. (2d) 26). It will be observed that the estoppel was *against* the appellant who was a party to both actions. The court did not intimate, much less decide, that a parent corporation may recover on a claim belonging to its subsidiary in an action in which the subsidiary is not a party, or that a judgment entered in such an action would operate as an estoppel *against* the subsidiary.

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n*, 247 U. S. 490 (Br. pp. 91-92), a terminal railroad owning terminal track in the City of Minneapolis was controlled jointly by two parent railroads. An extra charge to shippers was made by the parent railroads for receiving cars from the subsidiary, which was passed on to the subsidiary and returned in part to the parents as dividends. There was a long term contract "of much significance" (247 U. S. 495) among the three companies, which the Supreme Court said was designed to take away from the directors of the subsidiary the normal legal control of the company's affairs in several important respects (247 U. S. 496). After making the statement quoted in appellant's brief (Br. pp. 91 and 92), the Supreme Court agreed with the state courts

"that *the fact that the legal title* to what are obviously terminal or spur delivery tracks *is in the East-*

ern Company [the subsidiary] should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies" (247 U. S. 501).

In *Centmont Corporation v. Marsch* (C. C. A. 1), 68 F. (2d) 460 (Br. pp. 92 and 93), the court made the statement quoted by appellant (Br. pp. 92-93) and held that appellant's assigned claim of the parent corporation against the subsidiary (in receivership at the parent's instance) was not on a parity with the claim of the appellee who was a direct creditor of the subsidiary. The parent was a railroad company which had organized the subsidiary railroad company for the purpose of extending its line into the State of Massachusetts.

In *Roof v. Conway*, 133 F. (2d) 819 (Br. pp. 93-95), it appeared that some years before the federal receiver of Indiana, Columbus & Eastern Traction Company, with the informal approval of the court (the District Court of the *Northern* District of Ohio), caused a subsidiary to be formed to operate a bus line. The subsidiary entered into an agreement with appellants. Thereafter the Traction Company receiver sold all the company's assets to Cincinnati & Lake Erie Railroad Company, including the stock of the subsidiary and the rights under the contracts with appellants. Later the Railroad Company went into federal receivership in the *Southern* District of Ohio and all of the capital stock of the subsidiary "was embraced in the order marshaling assets" (133 F. (2d) 821). The

District Court for the Northern District of Ohio transferred the Traction Company receivership to the Southern District. This present action was brought in the Southern District of Ohio by the federal receivers of the Railroad Company to restrain appellants from breaching their contract with the subsidiary. The jurisdiction of the District Court of the Southern District to restrain the breach of contract depended upon whether or not the subject matter was in the custody of that court so as to make the pending action "dependent upon and ancillary to the cause in which the Cincinnati & Lake Erie Railroad Company is being operated in receivership" (133 F. (2d) 822). The Circuit Court of Appeals, after making the statement quoted in appellant's brief (pp. 93-95), held that the District Court had jurisdiction.

Nothing that is said in any of the cases cited by appellant tends to disclose any error on the part of the court below in holding that appellees were entitled to a more definite statement in respect to the subsidiaries of Transamerica [R. 358-359]. None of these cases supports appellant's contention that Transamerica's subsidiaries are not necessary or indispensable parties to this action. In *Kimberly Coal Co. v. Douglas, supra*, the moving party which was held to be estopped by the prior judgment was a party to both actions. In *Chicago, etc. Ry. Co. v. Minneapolis, etc. Association, supra*, both parent corporations and the subsidiary were before the court. In *Centmont Corporation v. Marsch, supra*, the subsidiary, the parent, the parent's assignee and the creditor of the subsidiary were all before the court. In *Roof v. Conway, supra*, all the stock of the subsidiary had been marshaled and was in the custody of the court through its receiver, and the

subsidiary was wholly under the control of the court, as much so as if it were a party by name.

No reasons of justice or equity have been advanced by appellant herein as to why the court should pierce the corporate veil of Transamerica's subsidiaries. Since the 1936 amendment to Section 51 of the Judicial Code (28 U. S. C., Sec. 112) Congress has provided a simple remedy for the stockholder of a parent corporation who claims the subsidiaries have been injured, namely, a double derivative suit in which the subsidiaries are named and served as defendants.

In the case at bar, where appellant is seeking to recover in behalf of Transamerica for a chose in action belonging to the subsidiary, neither the factual premise nor the legal argument which form the basis of appellant's contentions (Br. pp. 88-89) can be conclusively determined so as to protect the individual defendants in the absence of the subsidiaries as parties to the action.

Although the cases of *Greenberg v. Giannini*, 140 F. (2d) 550, and *Philipbar v. Derby* (C. C. A. 2), 85 F. (2d) 27, involve the indispensability of the corporation as a party before the court in a single derivative action, the reasoning of the opinions is directly applicable here.

In *Greenberg v. Giannini*, *supra*, Greenberg, a stockholder of Transamerica, brought identical actions in the New York State court and in the Federal District Court for the Southern District of New York to recover judgment in favor of Transamerica against Amadeo P. Giannini on account of payments under the salary agreement. A. P. Giannini was served, and removed the state action to the Federal court where the two actions were heard to-

gether. Plaintiff then served Transamerica in Delaware. The purported service on the corporation was set aside and the actions dismissed on A. P. Giannini's motion. On appeal, the Circuit Court of Appeals affirmed. The court held that since Transamerica was not doing business in New York and A. P. Giannini was a resident of California, the service on Transamerica in Delaware was invalid and unauthorized under Title 28, U. S. C., Section 112. The stockholder (Greenberg) however appeared "to suggest, perhaps to argue, that, since Transamerica Corporation was the creature of Giannini, and had no independent will, it is to be treated as though it had actually appeared in the action" (140 F. (2d) 553). The court refused to accede to this argument on the authority of *Philipbar v. Derby, supra*, 85 F. (2d) 27.

Turning to defendant A. P. Giannini's motions to dismiss the complaint in both actions, the court said:

"* * * it has been settled law for over a century (Cunningham v. Pell, 5 Paige, N. Y., 607) that the wronged corporation is an indispensable party to a shareholders' action. *City of Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Baltimore & Ohio R. Co. v. City of Parkersburg*, 268 U. S. 35, 45 S. Ct. 382, 69 L. Ed. 834; *Philipbar v. Derby, supra*, 85 F. 2d 27, *Cf. Niles-Bement-Pond Co. v. Iron Moulders' Union*, 254 U. S. 77, 41 S. Ct. 39, 65 L. Ed. 145. *It is hornbook law that the claim is the corporation's, and for that reason the delinquent directors will not be protected by any judgment which does not conclude the corporation.* If they succeed in defeating the action, other shareholders may bring another; if the recovery is too little, the same thing is possible. Therefore, as soon as the service of process upon the

Transamerica Corporation was set aside in the case at bar, it became inevitable that the complaints against Giannini should be dismissed.”

140 F. (2d) 554.²⁸

In *Philipbar v. Derby, supra*, the same situation obtained. There a stockholder of Derby Oil and Refining Corporation brought an action in New York, which was removed to the Federal court. Derby alone was served. Process could not be had against the corporation. The Circuit Court of Appeals, in affirming the judgment of dismissal, held that the corporation was an indispensable party defendant whose presence was necessary in order to protect the defendants. Plaintiff urged, however, that Derby should not be permitted to raise the point, because he was alleged to have been concerned in its refusal to appear voluntarily. The court denied this contention, saying:

“This curious argument misses the reason why the corporation must be made a party at all. A decree in a suit against Derby, based on the theory that he was preventing the corporation from appearing, would bind it as little as though that allegation were absent. If this suit broke down, Derby would be sub-

²⁸In accord with the principle that the wronged corporation is an indispensable party are *Southern California Home Builders v. Young*, 45 Cal. App. 679, 684, 188 Pac. 586; *Pourroy v. Gardner*, 122 Cal. App. 521, 526, 10 Pac. (2d) 815. And see *Kelly v. Thomas*, 234 Penn. 419, 83 A. 307, 310, in which the court says: “Not only was its presence necessary to the plaintiff, but the defendants were entitled thereto so that the corporation might be concluded by any decree entered against them, and the company itself was entitled to notice in order that its interests and the rights of its creditors might be protected.”

ject to another; if it succeeded, he would also be subject to another to recover more than the amount of any decree herein.”

85 F. (2d) 30-31.

The contention of appellant in the case at bar as a ground why Transamerica may recover judgment on choses in action belonging to its subsidiaries in its essence is that factually and as a matter of law the subsidiaries were the *alter egos* of Transamerica. This contention is analogous, if not identical, with that unsuccessfully advanced by the plaintiff in *Greenberg v. Giannini*. The contention here advanced by appellant is not different in principle from that which the court designated the “curious argument” unsuccessfully made by the plaintiff stockholder in *Philipbar v. Derby, supra*.

Finally, the general rule is that the assets of a subsidiary belong to the subsidiary and not to the parent corporation.

Childress v. Hinch, 162 Okla. 296, 20 P. (2d) 571, 573;

In re Green's Estate, 231 N. Y. 237, 131 N. E. 900, 904;

Button v. Hoffman, 61 Wis. 20, 20 N. W. 667, 668-669.

In *Wormser, “Disregard of the Corporate Fiction”* (1927 ed.), pp. 17 and 18, the learned author says:

“And the fact that the owner of all the stock is another corporation, has been held to make no difference in principle, since title to corporate property is in the corporate personality, and not in its stockholders, whether individual or corporate.”

Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic and Commerce Ass'n, *supra*, 247 U. S. 490, one of the four cases relied on by appellant (Br. pp. 91-92), is in accord. The court there admitted the fact to be that legal title to the terminal or spur delivery tracks was in the subsidiary (247 U. S. 501, quoted *supra*). It merely held that this fact should not be used as an excuse to impose an additional charge upon the general public.

The long and short of the matter is that if, as appellant has alleged, Transamerica's subsidiaries suffered "irremediable injury and detriment," measurable in specific sums, because of the wrongful acts of the individual defendants, the law confirms the legal title to these choses in action in the respective subsidiaries and gives to appellant a remedy to redress these wrongs in behalf of the subsidiaries actually suffering injury, namely, *by making the subsidiaries parties defendant* and stating the respective claims in their favor (*Goldstein v. Groesbeck*, *supra* (C. C. A. 2), 142 F. (2d) 422, decided April 7, 1944). Since the law gave her this remedy, there was no occasion for her to appeal to equity to disregard the corporate entities of the subsidiaries. Instead of following this procedure, appellant, without making the subsidiaries parties or identifying the particular subsidiary injured or the amount of such injury, has attempted to recover in behalf of Transamerica for the wrongs done the subsidiaries under a theory which is not sustained by the authorities and is untenable.

The vague, indefinite and general allegations of appellant in her Second Amended Complaint in reference to the subsidiaries of Transamerica go to the very gist and foundation of her several claims. Even if appellant's

theory were correct, appellees would still be entitled to be informed of the matters specified by the court in the rulings quoted under this point. Appellant's theory is not sound—she cannot recover judgment for Transamerica in this action on choses in action belonging to the subsidiaries without making the subsidiaries parties to the action and parties to the judgment.

Appellant says that it is reasonable to assume that information relating to the subsidiaries would not be made available to her (Br. pp. 95-96) and that in a case of this character to require her to set out the information would be unreasonable (Br. p. 96). It is somewhat difficult to understand the basis for these suggestions (see statement of her counsel at the hearing of the motions directed at the Second Amended Complaint [R. 479]). She was not under this disability when she stated her cause of action under the salary agreement in the original complaint (see paragraph 13 thereof [R. 9].)²⁹ In stating her fifth cause of action in her First Amended Complaint she was able to identify the subsidiaries involved [R. 56 and 57]. Nor is it unreasonable to require a stockholder of a parent corporation who asserts that the subsidiaries have suffered injury and detriment to name the subsidiaries suffering the particular detriment and to make them parties defendant. The defect in appellant's Second Amended Complaint is more than a mere matter of uncertainty—it is a lack of indispensable parties defendant.

Appellant's theories are untenable and are not supported by the authorities upon which she relies.

²⁹Greenberg also had no difficulty in this regard. (*Greenberg v. Giannini*, *supra*, 140 F. (2d) at 551.)

V.

The Language of the Second Amended Complaint Is Vague, General and Indefinite, and the Gravamen of Its Charges Consists of Conclusions of Law or of the Pleader. Accordingly, the Second Amended Complaint Fails to State a Claim Against Appellees. (Answering Appellant's Part One, Br. pp. 43-68.)

In our argument on the statute of limitations (*supra*, Point III) and in reference to the subsidiaries (*supra*, Point IV), we pointed out a number of uncertainties and ambiguities going to the gist of plaintiff's claims. In addition to those noted, appellant in her Second Amended Complaint made use of conclusions of law rather than alleging ultimate facts.

Appellant alleged that the salary agreement and the credit entries were "pretended, fraudulent and fictitious" [R. 162, 163, 165], and also that the entries were computed upon "false, fictitious, unearned and unrealized profits" [R. 166].

In stating each of her five claims every corporate act of Transamerica and its subsidiaries was alleged to be "without legal right or authority" [R. 162, 165, 170, 171, 174, 175, 178, 179 and 181].

In addition to the grounds of the motions to dismiss considered in the argument under previous headings, most of said motions were also made upon the general ground that the Second Amended Complaint failed to state a

claim against appellees [Item (a), R. 193; Item 1, R. 218; Item (1), R. 238; Item (a), R. 256; Item (a), R. 296].³⁰

The motions for a more definite statement, in addition to the items noted in the argument under the preceding headings (Points III and IV, *supra*), specifically pointed out defects in the Second Amended Complaint consisting of the use of conclusions of law [record references, footnote 31, *post*].

The trial court in its opinion criticized the Second Amended Complaint, saying that it charged fraudulent and illegal acts by way of legal conclusions and recitals more or less vague and indefinite [R. 336-337; 353] and was replete with surplusage and repetitions [R. 353]. The court pointed out other matters "left to conjecture" [R. 337] and the lack of definiteness in charging violation of plaintiff's rights, citing Rule 9(b), which provides that "In all averments of fraud * * * the circumstances constituting fraud * * * shall be stated with particularity" [R. 347]. For the pleader to label the transactions concerning the salary agreement as fraudulent, fictitious, pretended and as being without legal right or authority, the court declared, was pleading legal conclusions rather than the facts from which the legal conclusions could be drawn [R. 357].

The court concluded:

"In the light of the allegations and admissions in her pleading, and in view of the circumstances and

³⁰The motion to dismiss of Bank of America, etc., as Administrator, upon the general insufficiency of the Second Amended Complaint, expressly recited that the allegations of wrongful acts were the pleader's conclusions [Item (1), R. 238].

conditions to which attention previously has been directed, we are persuaded that before it can be held that plaintiff has a cause or causes of action against defendants or any of them * * * it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint" [R. 358].

In addition to holding that defendants were entitled to be informed more definitely in respect to the allegations touching the statute of limitations considered in Point III, *supra*, and the allegations in reference to the subsidiaries considered in Point IV, *supra*, the court further concluded:

"Furthermore, they [defendants] should be informed respecting the ultimate facts upon which the pleader bases her charges to the effect that said [salary] agreement and the other transactions mentioned were fraudulent, fictitious and pretended, and without legal right or authority" [R. 358-359].³¹

The allegations of the Second Amended Complaint, that the salary agreement and the credits were pretended, fraudulent and fictitious, are plainly conclusions of law.

³¹This ruling was responsive to the following items in the motions for more definite statement: A. P. Giannini, Items B1 [R. 204], B3, B4, B5, B6 and B7 [R. 205], B11 and B12 [R. 206], B15 and B19 [R. 207], B23 [R. 208]; L. M. Giannini, *et al.*, Items 29 and 30 [R. 228], 32, 33, 34 and 35 [R. 229], 39, 40 and 43 [R. 230], 47 [R. 231] and 50 [R. 231-233]; Bank of America etc., as Administrator, Items 17 [R. 245], 18, 19, 20 and 22 [R. 246], 31 [R. 248], 36 [R. 249], 44 [R. 250]; A. H. Giannini, *et al.*, Items 7, 8, 9, 10 and 12 [R. 263-264]; Elkus, *et al.*, Items 10, 11 and 12 [R. 289-290]; White, Items 29 [R. 307-308], 30, 32, 33, 34 and 35 [R. 308], 39 and 40 [R. 309], 43 and 47 [R. 310] and 50 [R. 311].

In *Allen, et al. v. Montana Refining Co.*, 71 Mont. 105, 227 Pac. 582, a stockholder's action, it was held in the language of the twelfth syllabus:

“Allegation that pretended indebtedness of corporation to another was fictitious and sham was mere conclusion of pleader and of no force or effect.”

The allegations that each of the corporate acts of Transamerica “was done without legal right or authority” is clearly a conclusion of law.

Hedges v. Dam, 72 Cal. 520, 522;

See also:

1 *Bancroft's Code Pleading*, pp. 106, 107 and 117.

Appellant does not deny that these are conclusions of law. She boldly asserts that “under the present rules ‘legal conclusions’ are not prohibited but on the other hand are expressly permitted where they tend to a simple, concise and direct statement of a claim” (Br. p. 45).

The allegations of the Second Amended Complaint are vague, general and indefinite, and the gravamen of the charges consists of conclusions of law or of the pleader. Under the rules of pleading as they have been generally understood and practiced, such a complaint fails to state a cause of action and is vulnerable to a motion to dismiss or a general demurrer.

The following cases, all decided in *stockholder actions*, amply support the foregoing proposition:

Swan v. Consolidated Water Co. (C. C. A. 9), 28 F. (2d) 971, 972-974;

Loney v. Consolidated Water Co., 122 Cal. App. 350, 9 Pac. (2d) 888;

Smith v. Stone, 21 Wyo. 62, 128 Pac. 612, 616 (holding that while uncertainty and lack of definiteness in a complaint is ordinarily to be corrected by a motion to render the pleading more definite, nevertheless where the defects relate to many material facts, the complaint fails to state a cause of action);

Davis v. Cohn, 260 App. Div. 624, 23 N. Y. S. (2d) 104, 105-106;

Brandt v. McIntosh, 47 Mont. 70, 130 Pac. 413, 414-415;

Weinberger v. Quinn, *supra*, 264 App. Div. 405, 35 N. Y. S. (2d) 567, 571-572; affirmed without opinion, 290 N. Y. 635, 49 N. E. (2d) 131.

The allegations of the Second Amended Complaint, that the profits of Bancitaly Corporation were fictitious, unrealized, etc., and untrue and did not truly and correctly represent the actual and true net profits of Transamerica and its subsidiaries [R. 165-166], are plainly defective. For aught that appears from the Second Amended Complaint the amount by which the profits were false, fraudulent, fictitious and untrue may have been

“* * * the smallest fraction of one per cent, and such being the case the rule of *de minimis* would bar a recovery.”

Fox v. Mackay, 125 Cal. 54, 56 (a stockholder action).

Appellant contends that the new rules call only for “notice-pleading” rather than “fact-pleading” and authorize the use of conclusions of law, and in support of her contention quotes an article from 38 *Columbia Law Re-*

view, 1179 (Br. p. 45), and a number of cases. Two of the cases cited were decided by the Circuit Courts of Appeals for the Third and Fifth Circuits, respectively, a third case (*Securities and Exchange Commission v. Timetrust, Inc.*, 28 F. Supp. 34, Br. p. 46), is a decision of the District Court of the Northern District of California, and the remaining are from District Courts of other circuits. None of the cases cited is a stockholder's derivative suit, as appellant concedes (Br. p. 53). None of them except the *Timetrust* case involved charges of fraud, and that case involved statutory fraud and the allegations of the complaint were in the language of the statute (28 F. Supp. 42; and see 4 *Cyc. Fed. Proc.* (2d ed.) 656, footnote 92, citing the *Timetrust* case).³²

In *Continental Collieries, Inc. v. Shoher* (C. C. A. 3), 130 F. (2d) 631 (Br. p. 49), and *DeLoach v. Crowley's, Inc.* (C. C. A. 5), 128 F. (2d) 378 (Br. pp. 50-52), the trial courts apparently had not afforded plaintiff an opportunity to submit a further pleading, for the judgments of dismissal were entered upon the orders granting the motions to dismiss. In the case at bar the judgment of dismissal was entered after plaintiff had failed to ask for leave to amend within the forty-five day period expressly granted her.

In the cases cited by appellant the courts appeared to be impressed with the language of the rules (relied on

³²This court recently reversed the final judgment in this case (39 F. Supp. 45—referred to in the brief, p. 49) as to defendants Bank of America, A. P. Giannini and L. M. Giannini, all of whom, as well as John M. Grant (deceased), were completely exonerated. Appellant herein particularly singled out these defendants in stating the facts in the *Timetrust* case (Br. p. 46).

by appellant, Br. p. 44) that the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief" (Rule 8(a)(2)), and that "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required" (Rule 8(e)(1)). In one of the cases (*DeLoach v. Crowley's, Inc.*, *supra*, 128 F. (2d) 378) the court referred to Rule 8(f), which provides that "All pleadings shall be so construed as to do substantial justice" and confessed that "Just what this means is not clear * * *" (128 F. (2d) 380—quoted Br. p. 51).

The clauses in Rule 8 above referred to are not new or strange to the bench and bar of the western states.

Since 1872, Section 452 of the *California Code of Civil Procedure* has provided that

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."

With the exception of Arizona, all of the other states in the Ninth Circuit, as well as the Territory of Alaska, have similar code provisions (1 *Bancroft's Code Pleading*, p. 149, footnote 10).

Since 1872, Section 426 of the *California Code of Civil Procedure* has provided that the complaint shall contain

"* * * a statement of the facts constituting the cause of action, in ordinary and concise language
* * *."

The codes of Arizona, Idaho, Montana and Oregon contain a similar provision (1 *Bancroft's Code Pleading*, p. 66, footnote 17). The language of Section 426 of the California Code of Civil Procedure does not appear to be substantially different from the language of Rule 8 upon which appellant relies (Br. p. 44).³³

The foregoing code provisions have never been construed (as appellant would construe similar language in the Federal Rules (Br. p. 45)) so as to authorize a plaintiff suing in his own right, much less a plaintiff in a stockholder's action, to state a claim by the use of vague and indefinite recitals or of conclusions of law. No valid reason has been advanced why the new Federal Rules, similar in these respects to the provisions of most of the codes of the western states, should receive a different construction.

In *Fleming v. Dierkes Lumber & Coal Co.* (D. C. Ark.), 39 F. Supp. 237, relied on by appellant (Br. p. 52), the District Judge said:

"I am of the opinion that the framers of the rules did not intend to permit a plaintiff to subject a de-

³³Section 426, C. C. P., and other cognate sections have the effect of entitling plaintiff to "any relief embraced in the issues" (*Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, 57). Several kinds of relief may flow from a single cause of action (*Beronio v. Ventura County L. Co.*, 129 Cal. 232, 235, 61 Pac. 958). The rule is the same in other western states (see 1 *Bancroft's Code Pleading*, p. 12, note 14, and p. 199, note 3). The phrase "cause of action" as used in the codes of the western states is thus identical in meaning with "statement of claim showing that the pleader is entitled to relief." Compare also Sec. 427, *California Code of Civil Procedure*, where the language "claims arising out of the same transaction, or transactions connected with the same subject of action" is treated as synonymous with the phrase "several causes of action."

pendant to the various processes of the court without first stating definite facts upon which a judgment might be based.”

39 F. Supp. 240.

And further:

“The rule should not be so liberally construed as to destroy definiteness in pleading. A ‘short and plain statement’ must be reasonably definite or it will not be plain.”

39 F. Supp. 240.³⁴

While the decision in *Macleod v. Cohen-Erichs Corporation*, 28 F. Supp. 103, cited by appellant (Br. p. 56), indicates that in ordinary cases fair notice may be given by conclusions of law, and this view finds support among some of the professors of law (see 4 *Cyc. Fed. Proc.*, Sec. 1114, pp. 379-380), there are authorities to the contrary.

Zimmerman v. National Dairy Products Corp. (D. C. N. Y.), 30 F. Supp. 438, 439.

In *Brogdex Co. v. Food Machinery Corp.* (D. C. Del.), 29 F. Supp. 698, 699, it was held that it may not be improper to allege conclusions of law in order to show “the relation of the various facts to one another and to the relief sought.” But in the case at bar conclusions of law are alleged in lieu of or as a substitute for the ultimate facts. As the District Court pointed out, appellant was not “stating the ultimate facts from which,

³⁴A discussion of the question of “notice-pleading” may be found in 4 *Cyc. Fed. Proc.* (2d ed.), Sec. 1092, pp. 341-349.

if proved, such legal conclusions might properly be drawn, but rather pleading the legal conclusions themselves" [R. 357].

In 13 *Cyclopedia of Federal Procedure* (2d ed.) p. 451, it is said:

"The complaint in a stockholders' suit is, of course, governed by the general rules in regard to complaints as set out in the Federal Rules of Civil Procedure, and general and inferential averments or mere conclusions of fraud or wrongdoing, or of illegality or *ultra vires* action, are bad pleading, just as they are in any other complaint."

There are several reasons why a plaintiff in a stockholder action should not be permitted to state the gravamen of a claim by the use of vague and indefinite recitals and of conclusions of law.

Not every cause of action belonging to a corporation may be enforced by a stockholder (*Corbus v. Gold Mining Co.*, 187 U. S. 455, 463). The stockholder must make a special showing (*Harves v. Oakland*, *supra*, 104 U. S. at p. 460). Where, as here, the appellant's interest is trivial (less than \$50, see footnote 1 *ante*), the stockholder "should show a clear case by distinct affirmative allegations" (Pitney, V. C., in *Trimble v. American Sugar-Refining Co.*, *supra*, 61 N. J. Eq. 340, 48 A. 912, at 914. Accord: *Weinberger v. Quinn*, *supra*, 264 App. Div. 405; 35 N. Y. S. (2d) 567 (Aff. without opinion 209 N. Y. 635, 49 N. E. (2d) 131)).

It seems patent that the clear showing required of the stockholder cannot be made by the use of conclusions of law and vague and indefinite recitals. Such was the

holding of the courts, state and Federal, prior to the adoption of the new rules, and there is no reason to believe that the rules have made any change in that regard.

Except where a complaint is to be used as a basis for obtaining a preliminary injunction (Rule 65(b)), the only provision in the new rules requiring a verified complaint is in stockholder actions (Rule 23(b)). To permit a stockholder to state a claim by the use of conclusions of law and vague and indefinite recitals would make a dead letter of the provision of Rule 23(b) requiring that the complaint be verified.

The reason given in support of the view that a "notice pleading" is all that is required under the new rules and that the plaintiff may give such notice by the use of conclusions of law is the fact that other procedures, such as a motion for a more definite statement, pre-trial procedure, and the enlarged use of depositions, is more precisely adapted to the purpose formerly supplied by pleadings under the codes (see *Columbia Law Review* article, quoted at p. 45 of appellant's brief; see also quotations from various cases appearing in appellant's brief, top of p. 52, top of p. 56 and bottom of p. 58). The appellees herein did use "the familiar motions for certainty" (38 *Columbia Law Review*, 1179, quoted Br. p. 45). While the court did not in so many words grant these motions, it did make rulings responsive to many of the items therein contained.³⁵

³⁵Compare *Sheehan v. Municipal Light & Power Co.* (D.C., N. Y.), 1 F. R. D. 70, 71, holding that a motion for a more definite statement is a proper method for obtaining the particulars upon which the pleader bases his conclusions of law.

In a stockholder's action where the plaintiff is suing derivatively in the right of the corporation, the issues cannot be narrowed or the nature of the stockholder's claims revealed by depositions or pre-trial procedure. The stockholder plaintiff usually has little personal knowledge of the matters complained of.³⁶ Depositions of the corporation's officers do not constitute admissions binding on the plaintiff because one of the bases of plaintiff's action is that the corporation is in the control of the individual defendants.³⁷

It seems certain therefore that under the new rules conclusions of law and vague and indefinite recitals are not permitted, particularly in a stockholder's complaint.

Not only is this action a stockholder's action, but appellant's claim is grounded upon charges of fraud and illegality. Rule 9(b) provides that:

"In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity."

This sentence of Rule 9(b) introduces no new rule. It has been a widely expressed principle that fraud must be pleaded by allegations of specific facts.

1 *Edmunds, Federal Rules of Civil Procedure*, p. 432;

4 *Cyclopedia of Federal Procedure* (2d ed.), pp. 652-658, Secs. 1339-1341.

³⁶All the charges in the Second Amended Complaint herein are made on information and belief [R. 143].

³⁷Compare par. XXI of the Second Amended Complaint [R. 156-157].

It should be observed that the provision of Section 426 of the California Code of Civil Procedure, that the complaint should contain a statement of the facts "in ordinary and concise language", has never been thought to excuse the pleading of fraud with particularity.

Hershey v. Reclamation District No. 108, 200 Cal. 550, 561, 254 Pac. 542.

Compare:

Smith v. Stone, 21 Wyo. 62, 128 Pac. 612, 616 (a stockholder's derivative action);

Pritchard v. Myers, 174 Md. 66, 197 Atl. 620, 623 (a creditor's derivative action).

In *Hershey v. Reclamation District*, *supra*, the Supreme Court of California said:

"Fraud is never to be presumed, but it must be affirmatively pleaded and proved, or the facts from which it is to be inferred must be of such character that no other reasonable conclusion may be reached but the single one of evil design on the part of the person or entity whose acts are attempted to be impugned."

200 Cal. 561.

The presumption against fraud approximates in strength that of innocence of crime.

Truett v. Onderdonk, 120 Cal. 581, 588, 53 Pac. 26.

But considered under a system of pleading most "liberal" to the plaintiff the Second Amended Complaint herein did not afford appellees a fair notice. To make

this plain we will consider briefly each of the five causes of action in the Second Amended Complaint.

1. First Cause of Action—Recovery of payments under the salary agreement. The validity of agreements providing for incentive compensation is well settled (*Church v. Harnit, supra* (C. C. A. 6), 35 F. (2d) 499, 501). What facts took the salary agreement with Bancitaly Corporation out of the general rule and made it “pretended, fraudulent and fictitious” [R. 162, 163]? One corporation, acting through its board of directors, may absorb and take over the stock of a second corporation, and if it does so the liabilities of the second corporation are not affected. What facts take this case out of the general rule? One corporation may purchase all the assets of a second corporation and as a part of the transaction assume the second corporation’s liabilities. If it does so the purchasing corporation may not retain the assets and yet denounce the obligations as invalid (*Matthews v. Ormerd, supra*, 140 Cal. 578, 583, 74 Pac. 136; *Patten v. Pepper Hotel Co., supra*, 153 Cal. 460, 467, 96 Pac. 296). What are the facts which take this case out of the ordinary rule and permit a stockholder suing in behalf of Transamerica to denounce the salary agreement as “pretended, fraudulent and fictitious” [R. 162]? It is claimed that the profits of Bancitaly Corporation upon which the credits under the salary agreement were computed were false, fictitious, unearned and unrealized. Upon what facts are these general statements based?

2. Second Cause of Action—Recovery of brokerage fees and money for use as capital advanced to Walston & Co. It should be observed that this cause of action

is not for the recovery of "secret" profits. Appellant seeks judgment in favor of Transamerica for the return of the precise amount specified as having been paid by Transamerica or its subsidiaries as brokerage fees to Walston & Co. and also moneys advanced to that firm for use as capital. What facts made the act of the Board of Directors of Transamerica in discontinuing its brokerage business and using the services of Walston & Co. "without legal right or authority" [R. 170]? There is no allegation in the Second Amended Complaint like the allegation appearing in the original complaint [R. 17] that the fees were excessive. In respect to the recovery of moneys advanced to Walston & Co., as working capital what are the facts that authorize a plaintiff to institute an action in behalf of Transamerica for the recovery of these moneys? There are no allegations that Walston & Co. are about to become insolvent or that the recovery of the indebtedness is about to outlaw.

3 and 4. Third Cause of Action—Recovery of profits "earned and collected" by Pacific Coast Mortgage Company; and Fourth Cause of Action—Recovery of profits "earned and collected" by Mallory-Smith Syndicate. What facts made the loans and advances mentioned in these two causes of action without legal right or authority [R. 174, 175, 178]? Appellant is not here seeking the recovery of the moneys advanced by Transamerica and its subsidiaries in either transaction, for her allegations of damages have no relation to these sums. It would appear that appellant is claiming for Transamerica the alleged profits "earned and collected" by Pacific Coast Mortgage Company and the Mallory-Smith Syndicate, respectively, by trading on the market in shares of Transamerica stock

“and other stocks and securities” [R. 177 and 180] because the money used as capital was borrowed from Transamerica and its subsidiaries.

5. The fifth cause of action—expenditure of corporate funds in “manipulating and stirring the market” (*i. e.*, soliciting orders from the general public for the purchase of Transamerica stock). It appears from the Second Amended Complaint that among the “subsidiaries” of Transamerica were Bank of America National Trust and Savings Association, Occidental Life Insurance Company and Pacific National Fire Insurance Company [R. 144-145]. A widespread holding of Transamerica stock by small purchasers might enhance the good will of the bank and the insurance companies and bring new depositors to the bank and new policyholders to the insurance companies. What are the facts that make the act of the directors “without legal right or authority” [R. 181]? How are Transamerica and its subsidiaries irremediably damaged and injured by such “losses” [R. 181]? What are the facts that authorize plaintiff to substitute her judgment for that of the directors in a matter peculiarly within the discretion of the board and not *ultra vires* as to the corporation (compare *Corbus v. Gold Mining Co.*, 187 U. S. 455, 463)?

The Second Amended Complaint, by the use of conclusions of law and general, vague and indefinite recitals, failed to state a claim upon which relief could be granted. It failed to give appellees fair notice of the nature of appellant’s claims.

The trial court was correct in ruling that the Second Amended Complaint was indefinite in major particulars [R. 358-360] and that before it could be held to have

stated a claim against appellees or any of them additional facts would have to be alleged [R. 358].

The order of the trial court granting appellees' motions to dismiss for failure to state a claim was correct. Appellant's failure within the allotted time to request permission to file a third amended pleading warranted the judgment of dismissal.

VI.

Appellant's Contention That, in Passing on the Statute of Limitations, the Trial Court Considered as Evidence Matters Dehors the Second Amended Complaint Is Without Support in the Record.

(Answering appellant's Part Five, Br. pp. 112-120).

Appellant, in Part Five (Br. pp. 112-120) cites a number of cases holding that a motion to dismiss admits all facts well pleaded and that the averments of the complaint must be accepted as true (Br. pp. 112-116). It is argued that this rule, which is well settled, was violated by the trial court thereby constituting reversible error (Br. p. 116).

Specifically, appellant asserts (Br. p. 116) that the record discloses that the court in considering and deciding appellees' motions to dismiss considered the affidavit of Hector Campana [R. 271-273], including the letter of December 9, 1931, Exhibit A thereto [R. 274-281], the affidavit of Edmund Nelson, Esq. [R. 269-270], and a letter from the attorneys for appellee, A. P. Giannini [R. 362-366], enclosing photostatic copies of the minutes of the Board of Directors of Transamerica for their meeting of December 9, 1931 [R. 266-416]. Counsel says that it is obvious that the foregoing documents were by the appellees

intended and by the District Court considered as evidence showing that appellant in December, 1931, received said letter of December 9, 1931, and acquired knowledge concerning the salary agreement, thereby starting the running of the statute of limitations (Br. p. 116). It is contended that upon the trial of the merits appellant would be entitled to cross-examine witnesses concerning the circumstances surrounding the transactions mentioned in these documents and had the right to deny the receipt of the letter of December 9, 1931 (Br. p. 117).

The contents of the papers referred to have been given in the statement of facts (*ante*, pp. 20-22) and need not here be repeated.

We have already pointed out in the argument under Point II, that the Campana affidavit was properly submitted in support of appellee's contention that a separate statement of claims founded on separate transactions would facilitate a clear presentation thereof (*ante*, p. 56). The papers referred to were likewise material in support of one of the grounds of the motions to dismiss made by all appellees except Elkus *et al.*, namely, that the Second Amended Complaint was sham and evasive (ground f [R. 194-195], ground 6 [R. 219], ground 7 [R. 239], ground f [R. 257], ground f [R. 297-298]), and in support of motions made by all the appellees except Elkus *et al.*, and Bank of America, etc., as administrator, to strike the entire Second Amended Complaint on the same ground [R. 213-214, 233-234, 266, 316].

Appellant in asserting that "The record in this case discloses" (Br. p. 116) that the court considered these documents in deciding the motions to dismiss does not cite any record reference. Nothing contained in the

District Court's opinion [R. 321-360] or elsewhere indicates, much less discloses, that the court considered the affidavits or the letter or the photostatic copies of the minutes of the Board of Directors for Transamerica as establishing the facts therein contained. The court did not grant the motion to dismiss the Second Amended Complaint upon the ground that the complaint was sham or frivolous nor did it grant the motion, made on the same grounds, to strike the entire Second Amended Complaint [R. 320].

There is no presumption that the court considered these papers as establishing the facts therein contained. (12 *Cyc. of Fed. Proc.* (2nd Ed.), p. 224, Note 7; *Abell v. State*, 109 Tex. Cr. App. 380, 5 S. W. (2d) 139, 141.) The presumptions are all to the contrary. (3 *Am. Juris.*, Sec. 924, pp. 490, 491; Sec. 933, p. 500.)

If the trial court had considered that the affidavits established the facts therein appearing it is quite unlikely that the court would have permitted appellant to apply for leave to file a third amended pleading [R. 320] as to appellee Bacigalupi, who had signed the letter of December 9, 1931 [R. 281], or as to other old directors who had ceased to be such in that year. At least as far as these appellees were concerned the letter constituted an effective "withdrawal" from the alleged conspiracy even within the strict rule of criminal conspiracies stated in *Eldredge v. U. S.*, 62 F. (2d) 449, 459, quoted in appellant's brief, page 105.

Moreover, counsel for appellee A. P. Giannini, with the acquiescence of counsel for all the other appellees, conceded appellant's right to deny receipt of this letter [R. 481-482]. It is quite unlikely that the trial court in the face of this concession would have considered these papers as overcoming this denial.

Appellant also contends in her Part Five that the court considered some of the statements set forth in the order of the Securities and Exchange Commission as “established facts” which started the running of the statute of limitations or required the application of the doctrine of laches as a bar to the further prosecution of plaintiff’s action (Br. p. 117). As we have shown under Point III (*ante*, p. 78), the court did not consider the statements contained in said order as establishing any fact but merely as showing the extent of appellant’s discovery. This order was referred to in the Second Amended Complaint [R. 185] and was submitted to the court by appellant herself. On this phase of the controversy appellant is bound by the decision of this court in *Hewitt v. Great Western Beet Sugar Co.*, *supra*, 230 F. 394. In the case cited the court said:

“The appellant contends that the question whether his bill presents ground for equitable relief must be determined from the facts alleged in the body of the bill, and that recourse may not be had to the proceedings in the state courts of Idaho to determine what was at issue and what was decided therein. But it seems too clear to require discussion that when the appellant comes into a federal court of equity seeking to set aside a judgment of a state court, and in his bill he describes the suit in the state court, the parties thereto, and the issues involved, and sets forth the date of the judgment and the volume and page of the Reports wherein it is reported, he authorizes the court to advert to the reported decision and to read the same in connection with the allegations of his bill, with the same effect as if a copy thereof had been appended as an exhibit to his bill. The court in doing so does not, as suggested by the appellant, take judi-

cial notice of a proceeding of a state court, but takes notice of that which is brought to its attention by proper pleading.”

230 F. 398.

Appellant's contention that the court considered as evidence matters dehors the Second Amended Complaint is without merit.

Conclusion.

The record discloses that the infirmities of the First Amended Complaint appeared again in the Second Amended Complaint. The record also discloses that these infirmities were the subject of extended colloquy among the court and the various counsel and that it was definitely decided and agreed that the separate claims should and would be stated separately. After analysis and extended discussion of the First Amended Complaint, followed by direction of the court that the complaint be separated into counts, counsel for appellant specifically stated:

“Now, as I said before, we have no objection to separating our complaint into counts on the various statements of the claims * * *” [R. 473].

Again, following presentation of motions, argument and discussion in open court respecting this same infirmity repeated in the Second Amended Complaint, counsel for appellant states:

“Now, if Your Honor thinks that a suit against fiduciaries under the circumstances of this complaint, or any one who does them, is more than one cause of action or more than one claim, *I again say* we will separate it” [R. 480].

Considered in the light of the record just cited, the suggestion to this court of counsel for appellant, found on the last page and in the last sentence but one of their brief (Br. p. 122) that counsel does not claim perfection for the pleading “and is quite willing, if properly advised, to make any corrections of form which may be required, but on the other hand is unwilling to basically change the legal theory to one which does not give the complete relief to which the shareholders * * * are entitled * * *” is a surprising admission. Counsel had been “properly advised” and in fact had been twice “properly advised.” Counsel admit as much in the statement made following argument and discussion of the Second Amended Complaint when they say “I again say we will separate it” [R. 480].

We do not understand that appellant on this appeal is entitled to an advisory opinion or declaratory relief. Counsel for appellant were twice directed by the trial court to separate their causes of action, twice agreed to do so and twice failed to comply. In effect, what appellant now asks is that this court set aside the judgment of the trial court to the end that counsel for appellant may now embrace an opportunity twice rejected.

The statement of counsel for appellant that they are “unwilling to basically change the legal theory * * *” (Br. p. 122) has no persuasive effect on the matter of separate statement of causes of action, for the reason that there would be no change, basic or otherwise, in the legal theory of the complaint by stating the separate claims in separate counts or causes of action. The theory upon which recovery is sought would be identical in each instance.

The conclusion of the trial court that "before it can be determined any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her Second Amended Complaint" [R. 358] would not have required a change in appellant's theory.

For appellant to have made the corporate subsidiaries parties would not have resulted in a basic change in the legal theory of the action, although it necessitated an abandonment of appellant's untenable theory that a stockholder may recover judgment in favor of a parent corporation upon choses in action belonging to the corporate subsidiaries in an action in which the subsidiaries are not parties.

Neither would the requirement of the court that appellant accompany her allegations of fraud and wrongdoing with allegations of ultimate facts rather than vague and indefinite recitals and conclusions of law require a basic change in legal theory. The ruling required an allegation of ultimate facts as distinguished from an allegation of conclusions based upon ultimate facts. Compliance with this requirement in no manner would change the theory of fraud and wrongdoing upon which the complaint proceeded. Appellant after repeated, extended hearings in open court and upon written briefs, during which the defects of her pleadings were definitely pointed out, fully discussed and considered, concluded to reject the direction of the trial court and to stand upon a pleading which in open court appellant had twice agreed to amend. It would appear that through the process of appeal appellant is limited to the establishment of reversible error occurring in the trial court. That no such error has occurred we

believe is definitely established by the record and perhaps by implication, in the closing paragraphs of appellant's brief, where willingness is expressed "if properly advised" to make corrections in the form of the pleading.

Appellant should have stated the five claims founded upon separate and distinct transactions in five separate counts, as directed by the court, and the trial court was justified in granting the motions to dismiss because of appellant's failure to do so. Each of the causes of action is barred by the statute of limitations and by laches. The corporate subsidiaries of Transamerica were indispensable parties and the Second Amended Complaint was defective in failing to join them. The said complaint failed to state a claim against any of the appellees and was indefinite in the particulars specified by the court. The authorities we have cited and the arguments above advanced amply support the order of the trial court granting the motions to dismiss. Appellant having failed to submit a Third Amended Complaint within the time allowed by the court, the judgment of dismissal was proper and should be affirmed.

Respectfully submitted,

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APPENDIX.

California Civil Code, section 375 (added Stats. 1943, Chap. 934, sec. 1):

“Sec. 375. [Suit against director, officer or employee : Assessment of expenses or indemnity.]

[*Assessment of expenses against corporation or representative.*] If any person, either alone or with others, is sued in any action or proceeding, by reason of his being or having been a director, officer or employee of a corporation, domestic or foreign, and arising out of his alleged misfeasance or non-feasance in the performance of his duties or out of any alleged wrongful act against the corporation or by the corporation, whether such action or proceeding is brought by the corporation or by one or more shareholders or creditors or the receiver or trustee of the corporation, any governmental body, any public official or any private person or corporation, the reasonable expenses, including attorneys' fees of any said director, officer or employee, incurred in the successful defense of such action or proceeding, whether now pending or commenced hereafter, may be assessed against the corporation or its representative either by the court in which such action or proceeding is brought or by the court in a separate action or proceeding against the corporation or its representative.

[*Assessment of indemnity where defendant is successful or action is settled.*] If any director, officer or employee is successful in whole or in part, or if the action or proceeding against him is settled with the approval of the court, and if the court also finds that the conduct of any such party is such as fairly

and equitably to merit such indemnity, reasonable expenses, including attorneys' fees, of any or all such parties may be assessed against the corporation in such amount as the court determines and finds to be reasonable, either in the same action or proceeding or in a separate action or proceeding against the corporation or its representative.

[*Notice of application for indemnity: Service: Form: Who may make application: Direction as to payment.*] Notice of the application for indemnity for such expenses shall be served upon the corporation or its representative and upon the plaintiff and other parties in the action or proceeding. Notice may be given either personally or by mail or other written communication to the shareholders in the manner provided by Section 314 of the Civil Code with respect to shareholders' meetings, in such form as the court may direct. Application for indemnity for such expenses may be made either by one of the parties litigant or by the attorney or other person rendering services to him and the court may direct fees and expenses to be paid direct to the attorney or other person rendering service to the party litigant, although not himself a party to the action.

[*Award to be by court order: Rights and remedies exclusive.*] The awarding of indemnity for expenses, including attorneys' fees, to the parties to any such action or proceeding, whether terminated by trial on the merits or by settlement or dismissal, shall be by order of the court and shall not be governed by any provision in the articles of incorporation or by-laws of the corporation or by resolution or agreement of the corporation, its directors or shareholders, but the rights and remedy given by this section are hereby declared exclusive."

Excerpt from *Bowman v. Wohlke*, 166 Cal. 121 at 124-126:

“From what we have said it is apparent that in both the original and amended complaints were united claims for injuries to character, to person, and to property. The same were not ‘separately stated.’ Of course, in view of our statutory provisions, causes of action for injuries to property may not be united in one action with causes of action for injuries to the person or character. (See Code Civ. Proc., sec. 427.) And where causes of action may be united they must be separately stated. (*Id*) The theory of counsel for plaintiffs is that by reason of the claim that all the acts were done in pursuance of a conspiracy, we have but a single cause of action stated in the complaint, a cause of action for damages for ‘conspiracy,’ and that any variety of wrongful acts, whether ordinarily capable of being united in a single action or not, may be so united if done in pursuance of a conspiracy. We are satisfied that this theory is irreconcilable with well settled rules of law, and cannot be upheld. As early as 1864 this court said in *Herron v. Hughes*, 25 Cal. 560: ‘A simple conspiracy, however atrocious, unless it results in actual damage to the party, never was the subject of a civil action; and though such conspiracy is charged, the averment is immaterial and need not be proved. Where two or more are sued for a wrong done, it may be necessary to prove previous combination in order to secure a joint recovery, but it is never necessary to allege it, and if alleged it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done.’ In *Davitt v. Bakers’ Union*, 124 Cal. 99, [56 Pac. 775], it is said that ‘a conspiracy, however atrocious its purpose, is not the subject of a civil action.’ In

Dowdell v. Carpy, 129 Cal. 168, [61 Pac. 948], where the act complained of as being done in pursuance of a conspiracy was an alleged malicious prosecution, it was said that 'the gravamen of the action is the alleged malicious prosecution,' with its consequent injury to the plaintiff, and the language of *Dreaux v. Domec*, 18 Cal. 83, relied on by respondents as intimating differently, was declared, if capable of the construction claimed, to be 'against all the authorities.' In *More v. Finger*, 128 Cal. 313, [60 Pac. 933], a case cited by respondents, it is said: 'The complaint alleges that the plaintiff has been deprived of the note by the wrongful acts of the defendants, and that they entered into a conspiracy for that purpose, but the conspiracy thus alleged is not the gist of the action. The gist of the action is the injury done to the plaintiff by these wrongful acts and this injury is actionable whether it is the result of a conspiracy or not. The averment of a conspiracy is immaterial, and could be proved without such averment, or, if averred, need not be proved. The plaintiff is entitled to relief for the injury from such of the defendants as she can show have united or cooperated in doing her the wrong.' These statements are in full accord with the authorities everywhere. For instance, in 1 Cooley on Torts (3d ed.), p. 210, it is said: 'The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. The damage is the gist of the action, not the conspiracy.' In *Green v. Davies*, 182 N. Y. 503, [3 Ann. Cas. 310, 75 N. E. 537], it is said: 'While it is true that in a criminal prosecution for conspiracy the unlawful combination and confederacy are the gist of the offense, not the overt acts done in pursuance thereof, . . .

the doctrine does not apply to civil suits for actionable torts.' (See, also, *Huntley v. Louisville etc. R. R. Co.*, 105 Ky. 162, [88 Am. St. Rep. 298, 63 L. R. A. 289, 48 S. W. 429]; *Jenner v. Carson*, 111 Ind. 522, [13 N. E. 44]; *Doremus v. Hennessy*, 62 Ill. App. 391; *Marten v. Holbrook*, 157 Fed. 717; 6 Am. & Eng. Ency. of Law (2d ed.) 873; 8 Cyc. 647.) In *Jenner v. Carson*, 111 Ind. 522, [13 N. E. 44], it was said that the allegation of a conspiracy in a civil action against several for a tort is of no consequence, so far as respects the cause and ground of action, unless the wrong complained of would not have been actionable at all, but for the unlawful combination of several persons; and that damage is the gist of an action for a tort, not the conspiracy. The same idea is expressed in *Green v. Davies*, 182 N. Y. 499, [3 Ann. Cas. 310, 75 N. E. 536], where it is said: 'There may be cases where acts committed in pursuance of a *combination* of a number of persons to injure a third person are actionable, while the same acts, if done by a single individual, acting without such concert, would not be actionable. Such cases may be termed actions for conspiracy, but where the conspiracy results in the commission of that which would be an actionable tort, whether committed by one or by many, then the cause of action is the tort, not the conspiracy.' In such cases it has been said that 'the allegation and proofs of a conspiracy in an action of this character is only important to connect a defendant with a transaction and to charge him with the acts and declarations of his co-conspirators, where otherwise he could not have been implicated.' (*Brackett v. Griswold*, 112 N. Y. 454, [20 N. E. 376]. See, also, 8 Cyc. 647; *Doremus v. Hennessy*, 62 Ill. App. 391.) The effect of this well-settled doctrine in so far as the case before us is concerned

is clear. The complaint alleged various causes of action for different torts, all committed, it is true, in pursuance of a single conspiracy, but each, nevertheless, giving rise to a separate cause of action for the injury caused by the particular wrongful act. Whether or not the various causes of action could properly be united depended on our statutes relating to the joinder of causes of action in one complaint. A similar question to the one we are considering was presented in the case of *Green v. Davies*, 182 N. Y. 499, [3 Ann. Cas. 310, 75 N. E. 536], hereinbefore cited, where, upon the theory that a single cause of action for damages for a conspiracy was being stated, various wrongful acts, each constituting a tort, were alleged in the complaint, when, under the statutes of the state, causes of action for the various torts alleged could not be united in one complaint. The action of the trial court in overruling a demurrer on the ground of improper joinder was reversed, without any dissent. The opinion contains a very clear discussion of the doctrine we have stated, and holds that the theory that the action was not for slander or malicious prosecution, but for conspiracy to injure the plaintiff, of which the slander and arrest were merely the overt acts done in execution of the conspiracy, was opposed to the decisions and cannot be upheld. To use the words of another New York opinion, such a complaint does not show 'a single, indivisible wrong, for which an action will lie,' but 'an aggregation of certain tortious acts, for each of which a separate action will lie for the recovery of the damages flowing therefrom.' (See *Kolel v. Eliach*, 29 Misc. Rep. 503, [61 N. Y. Supp. 937].) We find nothing in any of the authorities cited by counsel for respondents to cause us to doubt the correctness of the views we have expressed."

[TITLE OF COURT AND CAUSE.]

MEMORANDUM OF CONCLUSIONS, JUDGE HOLLZER'S
CALENDAR.

[R. pp. 321-360.]

The present case constitutes what is generally designated as a stockholder's derivative suit. Plaintiff is the owner of a small number of shares of the corporate defendant named Transamerica Corporation, hereinafter referred to as Transamerica. The number of defendants is quite large, totalling eighty-one in all. Of these forty-six are sued by their true names, one being designated in four different capacities, and two others being each sued in two different capacities. The remaining thirty-five defendants are designated under fictitious names.

The matters discussed herein arise upon several motions which various groups of defendants have interposed against the second amended complaint. Each group of defendants has filed a motion to dismiss, a motion to separately state causes of action in separate counts, a motion for a more definite statement or for a bill of particulars, and a motion to strike the entire complaint. In addition, certain of these defendants have filed a motion to strike out certain designated portions of the complaint.

This second amended complaint was filed by leave of court, granted at the close of quite an extended oral argument upon substantially similar motions directed against a first amended complaint. A clearer understanding of the legal questions requiring determination will be afforded by referring to certain portions of the discussion which took place during the aforementioned oral argument, when the first amended complaint was under attack. Upon that

occasion, it was pointed out that in said earlier complaint plaintiff had set forth in one and the same count allegations to the effect that as the result of sundry separate and distinct transactions, frauds had been perpetrated against Transamerica. Respecting such former pleading it was argued that one of the transactions therein complained of was alleged to have arisen out of a certain salary contract entered into prior to the organization of Transamerica between one of the defendants and a previously formed corporation and was described as involving the fraudulent disbursement of the funds of such earlier corporation pursuant to the terms of said contract; that another of the transactions there attacked was described as involving a fraud whereby Transamerica had assumed the liabilities of said earlier corporation, including the obligations of said contract and pursuant to the terms thereof had fraudulently disbursed various sums out of its own funds to the same defendant during a period both antedating the organization of Transamerica and also extending during approximately the first year of its existence; that a third transaction there complained of was described as involving a fraud whereby during a still later period and under the terms of the last mentioned contract Transamerica had improperly disbursed additional sums out of its own funds to the same defendant; that still a further transaction there complained of was described as involving a fraud whereby, during the years 1932 to 1938, inclusive, three of the defendants together with another individual who had died prior to the commencement of this suit, and whose personal representative was included as a co-defendant, had caused a certain co-partnership to be organized, under the name of Walston & Co., which partnership had been

composed of eight of the defendants together with said decedent—and whereby two of the aforementioned partner defendants had caused, and the co-defendant directors of Transamerica knowingly had permitted, Transamerica to divert all of the latter's security brokerage business to said co-partnership and to pay from its funds substantial sums as brokerage fees for services with respect to brokerage business so diverted and also to pay other substantial sums for use as capital for said co-partnership, all of which sums were divided among the aforementioned three defendants and said fourth person, since deceased; that yet another transaction there complained of was described as a fraud whereby two of the aforementioned defendants together with a third person since deceased, whose personal representative was included as a co-defendant, caused Transamerica to advance large sums of money to them, which sums had been used by them to acquire the controlling interest in the capital stock of a certain corporation and for the further purpose of enabling the latter corporation to engage in speculative stock operations, that such operations had been carried on during the years 1933 to 1936, inclusive, resulting in large profits to said corporation and which profits were paid to the aforementioned two defendants and said third person since deceased; that again still another transaction there complained of was described as a fraud whereby the aforementioned two defendants and said third person since deceased had organized a certain secret trust syndicate referred to as the Mallory and Smith trust, that said two defendants had caused, and the co-defendant directors of Transamerica knowingly had permitted, Transamerica to advance large sums to said trust syndicate which had employed the same for specula-

tive stock operations resulting in substantial profits, which in turn had been paid to two said defendants and said third person since deceased during the years 1933, 1934 and 1935; and that finally yet another transaction there complained of was described as a fraud whereby the aforementioned two defendants caused Transamerica to expend large sums of money in repayment of substantial losses and expenses incurred in connection with said speculative stock operations.

During the course of the aforementioned argument the court commented in part as follows:

“For example * * * I see no basis upon which any decision relative to the so-called contract, salary contract transaction, will have the slightest bearing in determining the legality or illegality of the so-called Walston and Company venture, and vice versa.”

The court further pointed out that in the first amended complaint the plaintiff had charged that several separate and distinct ventures were illegal and had caused detriment to Transamerica and its stockholders. Another observation on the part of the court was to the effect that plaintiff should be allowed to file another amended bill, wherein some of the transactions complained of might be segregated into different counts.

Toward the close of that argument, and in reply to the court's suggestion to the effect that such matters as the so-called salary transaction, the Walston & Company transaction and the Mallory Trust transaction be treated in separate counts, plaintiff's counsel at first indicated that he would like to present a further memorandum on that point.

During this same discussion opposing counsel urged that an inspection of the minutes and other corporate records of Transamerica would disclose that during the latter part of 1931 and the early part of 1932 a majority of the board of directors of Transamerica were hostile to those particular defendants who were charged in the complaint as being the instigators of and the principals in the various allegedly fraudulent transactions complained of and had taken affirmative action against those defendants. Hence they pointed out that in view of such facts it would ultimately be incumbent upon plaintiff to overcome the charge that the present suit is barred by laches. Accordingly, they argued that in view of the great length of time which had elapsed, the fact that most of the defendants had ceased to be directors of Transamerica for many years past, the further circumstance that two of the so-called principal defendants were dead, and likewise since plaintiff's counsel conceded that if this case were brought to trial it would entail bitterly contested, protracted hearings wherein the evidence would consist mainly of the conflicting testimony of witnesses relying almost solely upon their recollection of incidents that had occurred many years ago, it was fair and proper that the complaint disclose fully the essential facts pertaining to the question of laches in order that that issue might be settled at the very threshold of the litigation.

To the latter contention plaintiff's counsel responded in substance that while he agreed with the same in principle he was not then prepared to say how he would treat this point in a complaint.

Somewhat later in the argument plaintiff's counsel stated:

"Now, as I said before, we have no objection to separating our complaint into counts on the various statements of the claims, but it occurs to me that in doing it we should have the advantage of knowing just what the court's decision is on the other questions, * * *

In explanation of what was meant by the expression, "other questions", counsel added that he referred principally to the contention made on behalf of the defendants to the effect that the complaint failed to allege facts sufficient to relieve the plaintiff from the necessity of appealing to the stockholders to secure action on behalf of Transamerica before filing the present lawsuit. Whereupon the court announced that its ruling upon that point would be reserved until after the filing of a further amended complaint, and that while the court's tentative view then was that this contention was not sound, nevertheless, there was no reason why in such further amended pleading the plaintiff should not include anything she desired to add in justification for not appealing to the stockholders.

The minutes of the court disclose that at the conclusion of that oral argument an entry was made reading as follows:

"The court makes a statement re its present views. It is ordered that the plaintiff serve and file an amended complaint within sixty (60) days and that the defendants have thirty (30) days thereafter to plead thereto."

Thereafter plaintiff filed a second amended complaint together with a memorandum of points and authorities in

support thereof. Just as in the case of the previous complaint, plaintiff has incorporated all of the matters complained of in a single count.

In justification of this type of pleading plaintiff's counsel, during the oral argument upon the pending motions, asserted that subsequent to the entry of the order granting leave to file a second amended complaint certain matters had come to their attention which had induced them to adopt a different legal theory respecting this litigation, and it was accordingly upon this new theory that the present complaint had been drawn. Such different theory, counsel explained was to the following effect.

The first amended complaint was based upon the proposition that two of the defendants and a third person since deceased (whose legal representative was joined as a defendant) had conspired to acquire control of Transamerica and its affairs, that pursuant to such conspiracy, they had selected its directors, dominated its affairs and caused its directors to commit various breaches of their trust or fiduciary obligations and that in furtherance of such conspiracy various overt acts had been committed at the time, in the manner and in the particulars therein pleaded, causing damages to Transamerica in the respective amounts therein alleged. On the other hand, the second amended complaint was prepared upon the theory that all of the persons who at any time had served as directors of Transamerica had conspired to commit the aforementioned breaches of their trust or fiduciary obligations, that in furtherance of such conspiracy certain overt acts had been committed at the times, in the manner and in the particulars therein pleaded, causing damages to Transamerica, its subsidiaries and departments in the respective amounts

therein alleged, and that such of the defendants as had never served as directors were joined upon the theory that they had aided their co-defendants in committing one or more of the alleged breaches of trust.

It is the contention of plaintiff's counsel that but a single conspiracy has been pleaded in the second amended complaint; that all of those directors and any others who at any time allegedly entered such conspiracy are equally liable regardless when, if at all, they served as directors of Transamerica; also, that it is immaterial when the different alleged overt acts were committed or when damages resulted therefrom; and that even though it may be pleaded that different defendants, acting either as directors or otherwise, entered the alleged conspiracy at different times, nevertheless, according to the allegations of said complaint they are charged with having adopted the entire, single, illegal scheme, and hence all defendants are equally liable for all wrongs committed, including not only those perpetrated before they became directors or before they otherwise aided the alleged conspiracy, but also for all the various wrongs asserted to have been committed after they had ceased to be directors of Transamerica, or otherwise had terminated their connection with the enterprises claimed to have been involved with said conspiracy.

Examining the second amended complaint, it will be observed that the first eighteen paragraphs consist of more or less proforma recitals either identifying the parties to the litigation or otherwise pleading the matters which would entitle this court to take jurisdiction of the cause.

Paragraph XIX in substance charges that on or about October 11, 1928, all the defendants, including those particular individual defendants who at any time served as

directors of Transamerica, together with the two former directors who had died prior to the commencement of the suit, and in addition the forty-four other persons not sued as defendants but who at one time or another had also served as directors, conspired to control, operate and use Transamerica, its subsidiaries and departments, for their own benefit, by wrongfully appropriating its assets and otherwise using their official positions with Transamerica, and the confidential and special knowledge gained thereby, to the detriment of the latter corporation, its subsidiaries, etc. It is further alleged in the same paragraph that as a part of said conspiracy the defendants had said other persons not sued confederated to obtain and maintain control of the outstanding voting shares, also to select and dominate the members of all its boards of directors and all its principal officers, that in addition the defendants and said other persons conspired that, in the event any persons elected as such directors were not members of said conspiracy, they would at all times be entirely dominated by the defendants and said other persons to the extent that such other directors would be the dummies of the defendants and said other persons, and in the performance of their official duties would exercise no independent judgment, but would respond entirely to the will of the defendants and said other persons; and also that in the event that the defendants and said other persons for any period of time should fail to maintain control of the voting shares of Transamerica and of the election of its directors, nevertheless, said conspiracy would not terminate but that the defendants and said other persons would attempt to regain control of such voting stock, and if successful then said conspiracy would continue indefinitely.

In paragraphs XX to XL, inclusive, it is alleged that from time to time during a period covering many years the defendants and said other persons engaged in a series of transactions for the purpose of effecting the objects of said conspiracy. Particularly, it is charged in paragraph XXI that during all times mentioned in the second amended complaint up to the filing thereof, the defendants and said other persons obtained and exercised exclusive control of all the outstanding voting shares of stock of Transamerica and thereby elected all members of its several Boards of Directors and controlled and dominated its business policies and affairs.

Paragraph XXII discloses that through such stock control, of the forty-six designated by their true names, thirty-three defendants served at one time or another during the period involved herein as directors of Transamerica. Two others of such forty-six have been sued as the legal representatives of decedents who also at one time had been directors of that corporation. None of the remaining defendants appears ever to have held such position or otherwise to have been officially connected with that corporation.

Of the aforementioned thirty-three, sixteen had ceased to be directors by February, 1932, and thereafter had no further official connection with Transamerica, while another remained a director only about two months, namely, from February to April, 1932. At that time, as pointed out in the hereinafter mentioned order of the Securities and Exchange Commission issued in November, 1938, a change took place in the management. Of the remaining sixteen, one was a director only about eleven months, namely, from April, 1932, until March, 1933, another held that position about nineteen months, to-wit, from April,

1932, until November, 1933, while five others served as directors from February or March, 1932, until sometime in 1939, seven have been directors from February or March, 1932, until the filing of this suit, while only two have served in that capacity throughout the entire period involved in this litigation.

In paragraph XXIII there is set forth a list of forty-four other persons, none of whom is sued herein, but all of whom are also alleged to have served at one time or another as directors of Transamerica, and who likewise are described as having been among the co-conspirators. Their election as directors is claimed to have been effected similarly through the aforementioned stock control.

Of these forty-four other persons, it is asserted that one was a director but a single day, to-wit on February 15, 1932, five others held such position barely nine days (February 14 to 24, 1932), two others were directors only nineteen or twenty days (one on March 26, and again from September 4 to September 22, 1931, and the other from April 6, to April 26, 1932), three more served but 27 or 28 days (one from September 4 to October 1, 1931, and the other two on March 26 and again from September 4 to October 1, 1931), also seven others were directors hardly two months (February to April, 1932), eight more acted as such but approximately five months (from about September, 1931 to February, 1932), still another was a director only six months (from March to September, 1931), yet another barely eight months (January 20 to September, 1929), also another served hardly nine months (March to December, 1940), also one was a director but ten months (April, 1932 to February, 1933), yet another was elected to such office only about twenty days prior to

the filing of this suit and held the same approximately one year (March, 1941 to March, 1942), still another held such position barely thirteen months (January 19, 1929 to February, 1930), again two more served as directors only about one year and seven months (one from February, 1930 to September, 1931, and the other from July, 1930 to February, 1932), also another was a director barely one year and eight months (January, 1930 to September, 1931), again two more held such positions approximately two years and one month (January, 1930 to February, 1932), while two others served in that capacity only two years and four months (May, 1929, to September, 1931), still two others were directors barely two years and eight months (January, 1929 to September, 1931), again another served about two years and nine months (May, 1929 to February, 1932) while of the remaining two, one has been a director from March, 1940 to the date of the filing of the present suit and the other has served in such capacity from March, 1932 until the same time.

Thus upon the face of the second amended complaint it appears that during the period involved in this litigation Transamerica and its subsidiaries had been under the management of several different boards of directors.

In paragraphs XXIV and XXV it is asserted that each individual director of Transamerica who did not become a member of said conspiracy was a dummy director and at all times was controlled and dominated by the defendants and said other persons to the extent that in the performance of official duties and in all corporate acts they exercised no independent judgment, but responded to the will of the defendants and said other persons; that likewise such directors of Transamerica who did not become mem-

bers of said conspiracy or serve as dummy directors, either failed to discover any of the wrongful acts complained of, or, having discovered the same, failed at all times and in disregard of official duties, to take action or cause action to be taken to redress or prevent the continuance of such wrongs.

Paragraphs XXVI to XXIX, inclusive, charge in substance that among the overt acts done in carrying out such conspiracy the defendants and said other persons, acting through the board of directors of Transamerica on or about May 25, 1929 caused the latter corporation to acquire all of the capital stock and all of the assets, and also to assume the liabilities, of another corporation known as Bancitaly Corporation; that among such liabilities was a certain salary agreement which in 1927 had been entered into between Bancitaly Corporation and the defendant A. P. Giannini, and which provided that for the services to be rendered by him as president of the latter corporation, beginning January 1, 1927, he should be paid five percent of its net profits per annum with a guaranteed minimum of \$100,000. In that connection said pleading avers that the last named corporation had been operated and controlled by defendants A. P. Giannini, P. C. Hale and James A. Bacigalupi and others not named, and that the aforementioned salary agreement was fraudulent and fictitious. It is further averred that among the liabilities thus assumed were certain allegedly fictitious credit items entered between April 13, 1927 and May 25, 1929 upon the books of the last named corporation in favor of defendants A. P. Giannini and L. M. Giannini and one V. D. Giannini (now deceased) in sums aggregating approximately \$925,000.

It is further stated that acting through the Board of Directors of Transamerica the defendants and said other persons, between April 5, 1929 and the end of that year, caused to be entered on the books of said corporation, its subsidiaries and departments, as liabilities under the provisions of the aforementioned salary agreement, certain allegedly fictitious credits in favor of said last two named defendants and said V. D. Giannini (now deceased), in amounts aggregating not less than \$3,700,000.00. It is also there charged that between April 5, 1929 and January 1, 1939 the defendants and said other persons, acting through their several boards of directors of Transamerica, illegally caused said corporation and its subsidiaries, etc. to pay to said last three named persons, on account of the aforementioned credits, varying amounts aggregating \$3,700,000.00, and that of the latter sum certain particular installments totalling \$1,271,647.01, were paid to said parties in each of the years 1930 to 1939, inclusive.

Here it should be noted that, although according to the complaint Bancitaly Corporation had been owned, dominated and controlled by only three of the defendants, to-wit, Hale, Bacigalupi and A. P. Giannini, up until about May 25, 1929, including the time when the aforementioned salary agreement was entered into, and also the period during which it is claimed that false entries were made upon the basis of said salary agreement in the books of the latter corporation thereby crediting the defendants A. P. Giannini and L. M. Giannini and said V. D. Giannini (now deceased) with sums aggregating \$925,000, nevertheless, all of the defendants together with all of the forty-four other persons listed as having been directors at one time or another of Transamerica are accused of wrong

doing because of acts done in conformity with the provisions of said agreement. While the plaintiff charges that all of the defendants and said forty-four other persons committed fraudulent and illegal acts—recitals which are but legal conclusions—her pleading fails to set forth with particularity the ultimate facts and circumstances constituting the alleged fraud and illegality.

What, if anything, the defendants, other than the three last above named, or any of these forty-four other persons had to do with the making of said salary agreement, in what particulars the acts of those defendants and the forty-four other persons who were directors of Transamerica at the time the latter assumed liability under said salary agreement constituted fraud or other wrongful conduct, whether plaintiff claims that all of the defendants and all of said forty-four other persons knew that the credit entries made between April 5, 1929 and the end of that year in favor of defendants A. P. Giannini, L. M. Giannini and V. D. Giannini (now deceased), were false and fraudulent or fictitious, or whether plaintiff seeks to charge that because some of the defendants and other persons possessed such knowledge, particularly those who knew of these book entries or at least attended meetings of the board of directors of Transamerica during the period last mentioned, therefore all of the defendants and all of said forty-four persons may be charged as a matter of law with having caused such entries to be made upon the books of said corporation, its subsidiaries, etc., the complaint fails to disclose. Instead, much is left to conjecture.

The foregoing series of alleged wrongs may be described as having stemmed from or as being in some way con-

nected with the alleged fraudulent salary agreement. It will also be observed that many alleged wrongful acts are charged in language rather general though sweeping in character. Likewise it is claimed that these alleged wrongs were perpetrated over a period comprising many years, during which not only one or another of several different boards of directors of Transamerica presumptively controlled the management of that corporation, but in addition what might be termed the primary wrong in this particular series appears to have been committed by the management of a different and earlier corporation, with which virtually all but very few of the defendants had nothing to do.

Further illustrating the multiplicity of transactions complained of we find that in paragraphs XXX to XXXIII, inclusive, plaintiff avers in substance that on or about December 17, 1932 at a time when Transamerica, its subsidiaries, etc., were engaged in a profitable investment and brokerage business, the defendants and said other persons, for the purpose of enriching themselves, particularly the defendants A. P. Giannini, L. M. Giannini and Claire Giannini Hoffman, and said V. D. Giannini (now deceased), and acting through defendant L. M. Giannini and said decedent, caused the defendant co-partnership of Walston and Company to be organized; that thereafter, during each of the years 1933 to 1938, inclusive, and acting through each of the several different boards of directors of Transamerica serving at the particular period involved, the defendants and said other persons caused Transamerica, its subsidiaries, etc. to divert all of its investment and brokerage business to said Walston and Company for the purpose of enriching themselves, particularly

the last four named parties; and that during said last mentioned period, acting through each of the several different Boards of Directors of Transamerica, serving at the particular period involved, the defendants and said other persons caused Transamerica, its subsidiaries, etc. to disburse from the funds thereof to said Walston and Co. large sums as brokerage fees in connection with the business diverted as aforesaid and, in addition, sums for use as capital for said Walston and Company, the same aggregating about \$548,000, all of which sums were thereafter distributed by said Walston and Company to said last four named parties.

Here too, it may be pointed out that according to the pleader the series of so-called Walston and Company frauds extended over a period of many years, and that during those years each of the several different boards of directors of Transamerica which happened to be serving at the particular time involved caused one or more of said acts to be committed. In this connection it should be added that all of the members of the co-partnership firm of Walston and Company, including the last four named parties, are listed among the defendants herein.

Still another series of alleged wrongful acts is found set forth in Paragraphs XXXIV to XXXVI, inclusive. Here plaintiff has alleged that at sometime during 1932 all the defendants and said forty-four other persons organized a certain private trust syndicate, suing Charles J. Smith and Margaret Mallory as trustees thereof, to engage in speculative operations in the stock of Transamerica and other securities; that sometime in the year 1932 all of the defendants and said forty-four other persons, acting through the then Board of Directors of Transamerica,

caused the latter corporation, its subsidiaries, etc., to advance from the funds thereof amounts aggregating not less than \$1,500,000 to the defendants A. P. Giannini and L. M. Giannini and said V. D. Giannini (now deceased); that these three used such funds to acquire the controlling interest in the stock of another corporation (originally known as Bankitaly Mortgage Company, but later its name was changed to Pacific Coast Mortgage Company); that in addition all defendants and said forty-four other persons caused Transamerica, its subsidiaries, etc., to advance from the funds thereof into the treasury of Pacific Coast Mortgage Company amounts aggregating not less than \$1,500,000, which were employed by the latter corporation during each of the years 1933 to 1938, inclusive, in carrying on speculative stock operations; also that such advances were made to further the personal interests of the three persons last named; that during the years last mentioned said Pacific Coast Mortgage Company collected as the result of such speculative operations profits aggregating not less than \$2,000,000 which from time to time were distributed to the three persons last named; and that all of the alleged wrongs last enumerated were accomplished secretly and were concealed through purported loans and other transactions to secret agents, including one A. O. Stuart and A. P. Giannini Company, a corporation.

Here it should be pointed out that the allegations embraced within paragraphs XXXIV to XXXVI are so phrased as to leave uncertain whether plaintiff claims that the total of all the advances made from the funds of Transamerica with respect to the so-called Pacific Coast Mortgage Company dealings amounted to the sum of \$1,500,000 or the sum of \$3,000,000.

An additional series of allegedly wrongful acts is described in paragraphs XXXVII to XXXVIII. It is there averred that during each of the years 1933 to 1936, inclusive, all of the defendants and said forty-four other persons, acting through each of the several different boards of directors of Transamerica serving at the particular period involved, caused that corporation, its subsidiaries, etc., to advance from the funds thereof various amounts aggregating not less than \$3,000,000 to said trustees Smith and Mallory for use as capital in conducting the business of the aforementioned trust syndicate; also that such capital was employed by said trustees and the beneficiaries of said trust syndicate for speculative operations in the stock of Transamerica and in other securities, resulting in large profits to said trust syndicate aggregating not less than three hundred thousand dollars; that from time to time such profits were distributed, to the detriment of Transamerica, its subsidiaries, etc., in the amount last stated; and that such advances were consummated secretly and were concealed through purported loans and other transactions to secret agents. Here likewise the pleading is indefinite, that is, it is not clear whether plaintiff contends that the aforementioned profits were divided among the particular three or four persons who are repeatedly singled out in the complaint or that such profits were distributed among all of the defendants and all said forty-four other persons.

Still further illustrating the multiplicity of transactions complained of, we find that in Paragraph XXXIX plaintiff charges that at some time during each of the years 1932 to 1937, inclusive, all of the defendants and said forty-four other persons, acting through each of the sev-

eral different boards of directors of Transamerica serving at the particular period involved, caused that corporation, its subsidiaries, etc., to engage in manipulating the market for the stock of said corporation, and that as a consequence Transamerica, its subsidiaries, etc., incurred expenses and sustained losses aggregating not less than \$2,250,000.

In Paragraph XL as well as in the various other portions of the second amended complaint are found recitals to the effect that all of the defendants and said forty-four other persons, acting through each of the several different boards of directors of Transamerica serving at the particular period involved, caused the various corporate transactions complained of to be kept by an intricate system of accounting, contrary to customary and proper accounting principles and beyond plaintiff's understanding, to such an extent that said transactions at all times were concealed by entries made under false, fictitious and misleading designations, also that some of the acts complained of were caused to be withheld by the same parties from the records of Transamerica, its subsidiaries, etc., and to be evidenced by concealed and private agreements.

Paragraph XLI is devoted to setting forth the facts and circumstances describing how plaintiff first discovered the various alleged wrongs hereinabove described. It is upon the allegations of that paragraph that plaintiff relies to excuse her delay in the commencement of this suit.

In substance plaintiff there asserts that at all times up until about April 27, 1939, the defendants and said forty-four other persons kept concealed from her all the corporate transactions of which complaint is made; also that during all such times she had no knowledge, information

or notice concerning the same, or respecting any wrongful conduct of the defendants or of said forty-four other persons concerning their management of the business of Transamerica or its subsidiaries or departments; that she reposed complete confidence in defendant A. P. Giannini and all of the directors and officers of Transamerica and its subsidiaries, etc., until about April 27, 1939, when for the first time a certain proceeding then pending before the Securities and Exchange Commission of the United States was called to her attention. In this connection it is further alleged that thereupon she investigated said proceeding and ascertained that under date of November 22, 1938, said Commission had ordered a hearing to determine whether the stock of Transamerica should be suspended or withdrawn from certain securities exchanges by reason of false and misleading statements, which did not correctly reflect the true financial condition of Transamerica and its subsidiaries and departments; that on the date last mentioned she for the first time ascertained the matters and charges contained in the order of said Commission directing a hearing to be had respecting the same and that a copy of such order was being tendered for filing to show the nature and extent of plaintiff's first discovery of suspicious circumstances concerning the wrongs complained of.

Plaintiff further alleges that prior to April 27, 1939, she had no knowledge, information or notice concerning the aforementioned proceeding before said Commission, and did not have reason to suspect any of the defendants or other persons of wrongdoing in the conduct of the business of Transamerica, its subsidiaries, etc.; also that said proceeding before said Commission is still pending,

and that the matters and charges referred to in said order of said Commission were developed slowly through detailed examinations and audits of the records of Transamerica and its subsidiaries, etc., by expert accountants on behalf of said Commission, and were presented to it by the testimony of unwilling witnesses through examination of the latter by experienced lawyers. Finally it is therein averred that immediately after making the aforementioned discovery plaintiff proceeded to investigate and at all times ever since has continued diligently to investigate to ascertain the true and complete facts respecting the conduct of defendants and said forty-four other persons as to their management and operation of the business of Transamerica and its subsidiaries, etc., but thus far she has been unable to complete such investigation and is still proceeding therewith.

A pleading must be construed most strongly against the pleader. The presumption is that the latter has stated his cause as strongly as the facts warrant. In view of plaintiff's admission to the effect that at all times since April 27, 1939, she had continued diligently to investigate to ascertain the truth concerning the conduct of the defendants and the other directors with respect to their management and operation of the business of Transamerica, and that although she had been so engaged for a period of approximately two and a half years, nevertheless, she had been unable to complete such investigation and was still carrying on the same at the time of filing her last amended complaint, there arises at least the inference that when she does conclude such inquiry plaintiff may discover one or more of her charges to be unsupported by the facts.

The accusations made herein are of a most serious nature. The period of time involved extends over a great many years. The good name of an exceedingly large number of individuals is under attack. Prior to the filing of the present suit two of the allegedly chief conspirators had died. Their legal representatives are included among the eighty-one defendants. Since the filing of the second amended complaint one of the defendants also has died. So far as the pleading discloses only four of the present defendants are residents of this district. Where the remaining individual defendants reside, or from what distances they may be required to travel in order to attend the trial of this cause, does not appear, except that they reside in California. The principal office and place of business of Transamerica are alleged to be in the City and County of San Francisco, namely in the Northern District of this State. For aught that now appears the meetings of its directors have taken place in the latter district. Doubtless many corporate records, more or less voluminous, will need to be transported from the corporation's principal office for the purpose of the trial. The plaintiff herself claims to be a resident of the State of New York. Just why this litigation should have been filed in this District is not clear.

Under these circumstances before the defendants are subjected to the burdens, financial and otherwise, which a trial of the charges aforementioned would impose, they are entitled to be apprised with reasonable definiteness, both as to what it is claimed was their specific participation in the acts complained of, also wherein it is asserted their particular conduct constituted a violation of plaintiff's rights. In any event, plaintiff's admission as above stated to the

effect that she is still endeavoring to ascertain the truth of the charges she has made herein furnishes a most convincing ground for applying strongly against the pleader the rule that in all averments of fraud the circumstances constituting the fraud shall be stated with particularity. (See Rule 9b FRCP.)

Turning now to the aforementioned order issued by the Securities and Exchange Commission under date of November 22, 1938—we find that the same embraces in substance the following matters. It is therein recited that Transamerica had registered its shares of capital stock on certain national exchanges by filing on August 7, 1937 a certain application with said exchanges and with said Commission, pursuant to Section 12 (b) of the Securities Exchange Act of 1934 as amended, and pursuant to Rule JB1 of said Commission. Said order further declares that said Commission, having reasonable ground to believe that Transamerica had failed to comply with the provisions of said Section 12 (b) as amended and of its rules, in that said applications contained false and misleading statements of material facts, including financial statements of Transamerica and its subsidiaries, which did not reflect the true financial condition thereof, all as more particularly set forth under the heading of eighteen separate items, said Commission ordered that a public hearing be held to determine whether Transamerica had failed to comply with the provisions of said Act and of its rules in the particulars set forth in said order, and if so, to determine whether it would be necessary or appropriate to suspend or to withdraw the registration of Transamerica's capital stock on said exchanges. In addition this order designates the officer to conduct said hearing, and fixes the time and place for holding the same.

A reading of the particulars specified under said eighteen items discloses that, except as hereinafter noted, they all related to certain entries in the books and records of Transamerica or one or more of its subsidiaries, which entries purported to reflect the financial condition of said corporations as of December 31, 1936, and appeared to said Commission to be false and misleading. These entries included such matters as a certain charge to "Paid-In-Surplus" resulting from cancellations and redistribution of capital stock, appearing in the balance sheet of Transamerica as of December 31, 1936, which item in the Commission's opinion should have been entered as a current expense chargeable to profit and loss. Another specification pertained to alleged similar erroneous charges entered in 1934 and in 1935. Still other specifications referred to such items as excessive valuations of assets, the failure to charge off certain entries as losses, inadequacy of reserves, and like matters.

In addition said order pointed out that in the aforementioned applications Transamerica had failed to disclose that three of its then directors—one of these died prior to the commencement of this suit—constituted a "parent" of said corporation by virtue of the fact that said three directors at that time held general stock proxies empowering them to direct the management and policies of Transamerica; and also that in said application Transamerica had failed to state that during the years 1930 to 1936, inclusive, it had made disbursements in various amounts as remuneration to a certain officer and director thereof, to-wit, the defendant A. P. Giannini. Respecting the latter item, said order declared that the Commission had "reasonable grounds to believe that on January 20, 1930,

the sum of \$1,400,000 was placed on the books of Bancitaly Company of America (then a subsidiary of Transamerica Corporation) to the credit of A. P. Giannini; that of this \$1,400,000 all but \$792,000 had been paid to A. P. Giannini, by September, 1931, at which time counsel for the then existing management of Transamerica Corporation advised that further payment would be illegal; that thereafter subsequent to the change in management in 1932, A. P. Giannini withdrew from the balance of \$792,000 the following sums:" (here followed a list of five annual disbursements made to defendant A. P. Giannini in each of the years from 1932 to 1936, inclusive.)

It is to be noted that nowhere in the aforementioned order did said Commission declare or even intimate there was reasonable ground to believe that any of the defendants had engaged in a conspiracy or in any of the alleged wrongful acts complained of herein. On the contrary, the above quoted excerpt from said order rather would imply that said Commission believed that the management of Transamerica at least as it existed in September, 1931, had challenged the legality of the aforementioned credits entered in favor of the defendant A. P. Giannini, also that the Commission found that in 1931 the then existing board of directors of that corporation had been hostile to and had prevented him from drawing any further sums under said credits, and further believed that it was not until some time after "the change in management in 1932" that he succeeded in withdrawing any additional sums on account of such credits.

Furthermore, in view of the fact that at the time of the filing of the second amended complaint, namely after

it had been conducting its investigation over a period of about four years, said Commission had not been able to conclude the same, nor had it been able to determine whether Transamerica had failed to comply with any of the provisions of the Securities and Exchange Act or of its rules, or whether it would be necessary or appropriate to suspend or withdraw the registration of Transamerica's capital stock on any of the national exchanges, it can hardly be said that said order of the Commission supports plaintiff's averment to the effect that the disclosures made in said order uncovered the alleged wrongful acts of which she complains in the present lawsuit.

Indeed the status of the proceeding before said Commission after the lapse of nearly four years as above described, and the further circumstance that the Commission's order, upon which plaintiff apparently mainly relies to justify the very long delay in the filing of the present suit, contains no recitals supporting the charges she has made herein, rather warrants the conclusion that if the bar of the statute of limitations or of laches is to be avoided it will be necessary for plaintiff to plead other facts besides those set forth in her second amended complaint.

In the concluding paragraphs of her complaint, besides alleging she has no plain, speedy or adequate remedy at law, plaintiff has undertaken to explain why it would be futile for her to demand of the directors or of the stockholders of Transamerica to institute action to redress the alleged wrongs on account of which she seeks relief, in other words, to justify her omission to make any such demand. Respecting such omission, plaintiff has charged that all those who had been members of the several dif-

ferent boards of directors of Transamerica during any of the periods mentioned in her complaint, including those serving at the time of the commencement of this suit, have been sued as defendants or otherwise have been accused of committing the alleged wrongs pleaded therein, also that at all such times the defendants and said forty-four other persons held and exercised control of the voting shares of stock of Transamerica, that knowing such facts plaintiff had made no demand on the board of directors of that corporation or of its shareholders to institute such action, as such a suit to be effective must be directed against all of the defendants and the forty-four other persons named in the complaint, and accordingly that such a demand would be a futile and idle act. In that same connection, it is further asserted that the outstanding shares of stock of Transamerica are held by approximately 200,000 persons residing in substantially all of the states and territories of the United States and in numerous foreign countries, that such a demand upon the stockholders to be effective would require an expensive and prolonged struggle with adverse boards of directors and persons to wrest control of such voting shares from them, and that such struggle would be a futile and idle act.

By the prayer of her complaint plaintiff seeks a decree declaring a trust relationship between each of the defendants and herself and also between Transamerica and the defendants; also that all defendants render an accounting of their dealings with the assets, etc., of Transamerica and of their acts as directors and officers thereof concerning the transactions complained of; that upon such accounting judgment be entered against each of the defendants in the amounts to which Transamerica and the plain-

tiff may be entitled, but not less than the sum of \$8,798,000, together with an attorney's fee and costs, plus such other relief as may be equitable.

Analyzing this pleading in the light of the prayer thereof it would appear that of the \$8,798,000 sought to be recovered herein, the sum of \$3,700,000 is claimed to represent losses sustained as the result of payments made by Transamerica, its subsidiaries, etc., pursuant to the provisions of the so-called salary agreement, also the further sum of \$548,000 is described as constituting the damages suffered on account of what may be termed the Walston and Company series of transactions, likewise the further amount of \$2,000,000 is asserted to reflect the damages resulting from the Pacific Coast Mortgage Company dealings, while the sum of \$300,000 is referred to as constituting the damages arising out of the so-called Smith and Mallory trust syndicate series of transactions, and the balance of \$2,250,000 is charged as representing the losses resulting from stock market manipulations in which Transamerica and its subsidiaries purportedly engaged.

The pleading we are here considering is long and prolix, comprising thirty-seven pages. It is replete with surplusage and repetitions as well as legal conclusions, including numerous recitals, more or less general, vague and indefinite, charging various acts of wrongdoing. Among these are accusations of fraud, bad faith, breaches of trust and of fiduciary obligations, and also misappropriation and conversion of corporate assets.

These alleged wrongs are asserted to have commenced with an allegedly fraudulent transaction entered into during the year 1927, in other words, nearly a decade and a

half prior to the filing of the present litigation. During that rather lengthy period there were changes in the management of Transamerica through the election of several different boards of directors. Virtually a majority of those defendants who have been sued by their true names and who had served as directors had ceased to have any official connection with that corporation during the respective periods when it is asserted that all but one of the transactions complained of were consummated.

While it is averred that, with the exception of a few of the partners of Walston and Company, all of the defendants sued by their true names, together with the forty-four other persons listed, had served at one time or another as directors of Transamerica during most of the period within which the alleged wrongs were committed, nevertheless, it is charged that each of the series of transactions complained of stemmed from some corporate act performed by the particular board of directors acting in that capacity at the specific time involved. In other words, but for some corporate step on the part of those certain defendants who functioned as directors at the particular period involved, none of the alleged wrongful transactions could have been effected.

While plaintiff's counsel have argued that all of the acts complained of constituted but a single conspiracy extending over a period of about fourteen years, we see no escape from the conclusion that by her pleading plaintiff has sought to charge—as hereinbefore outlined—the commission of several separate and distinct series of wrongs, each disconnected from all the others. We are not persuaded that the evidence which, for example, might tend to prove the so-called fraudulent salary agreement or the

alleged wrongs committed in carrying out the provisions thereof, would have any connection with the evidence pertaining to what has been described as the series of Walston and Company transactions, or would throw any light upon the Pacific Coast Mortgage Company dealings, or would be relevant to what has been referred to as the series of Smith and Mallory trust syndicate transactions, or would have any connection with the operations whereby it is claimed Transamerica sustained large monetary losses as the result of engaging in stock market manipulations.

Furthermore, we do not perceive upon what legal theory it may be held that under the facts alleged any one of the aforementioned series of transactions constituted a part of or was bound up with any one or more of the remainder. Nor has any case been cited which would support plaintiff's contention to the effect that alleged wrongful acts, done by certain individuals while carrying out their functions as directors of a corporation, may be charged against others who neither were directors at the time such corporate steps were taken nor were otherwise engaged in the specific transaction involved.

Hence we conclude that each claim founded upon a separate transaction, as hereinbefore outlined, should have been stated in a separate count, and that such separation would have facilitated the clear presentation of the matters set forth. (See Rule 10b, FRCP.)

In essence the argument advanced by plaintiff's counsel is analogous to that presented on behalf of the plaintiff in the case of *Bowman v. Wolhke*, 166 Cal. 121, 135 Pac. 37. In the latter case, as here, the complaint consisted of but a single count. It was there contended that such a pleading was proper, even though several distinct tortious

acts were complained of, the argument being that these several acts had been committed in pursuance of a single conspiracy. Overruling such contention, the Supreme Court of California there declared in part:

“The theory of counsel for plaintiffs is that by reason of the claim that all the acts were done in pursuance of a conspiracy, we have but a single cause of action stated in the complaint, a cause of action for damages for ‘conspiracy,’ and that any variety of wrongful acts whether ordinarily capable of being united in a single action or not may be so united if done in pursuance of a conspiracy. We are satisfied that this theory is irreconcilable with well-settled rules of law and can not be upheld. * * *

“* * * For instance, in 1 Cooley on Torts (3rd Ed.), p. 210, it is said: ‘The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. The damage is the gist of the action, not the conspiracy.’ In *Green v. Davies*, 182 N. Y. 503, 75 N. E. 537, 3 Ann. Cas. 310, it is said: ‘While it is true that in a criminal prosecution for conspiracy the unlawful combination and confederacy are the gist of the offense, not the overt acts done in pursuance thereof, * * * the doctrine does not apply to civil suits for actionable torts.’ (Citing cases.) * * * To use the words of another New York opinion, such a complaint does not show ‘a single, indivisible wrong, for which an action will lie’ but ‘an aggregation of certain tortious acts for each of which a separate action will lie for the recovery of the damages flowing therefrom.’ See *Kolel v. Eliach*, 29 Misc. Rep. 503, 61 N. Y. Supp. 937. * * *

That a corporation in the forepart of 1927 entered into an agreement with the president thereof to compensate him for his services on the basis of five percent of its net annual profits, including a guaranteed minimum salary of \$100,000 per year, did not of itself constitute a fraudulent or fictitious or pretended transaction. Likewise, the circumstances that a second corporation about two years later acquired all of the capital stock and all of the assets and assumed all of the liabilities of the first mentioned corporation, including said salary agreement, did not of themselves make such transaction fraudulent or fictitious or pretended. Again, the fact that either or both of these corporations caused credits to be entered upon their respective books or caused disbursements to be made on account of the provisions of said salary agreement—such acts would not, by themselves, become fraudulent or fictitious or pretended. For the pleader to label transactions of the type above mentioned as fraudulent, fictitious, pretended and as being without legal right or authority, would not be stating the ultimate facts from which, if proved, such legal conclusions might properly be drawn, but rather pleading the legal conclusions themselves.

The second amended complaint lists twenty-six corporations as subsidiaries of Transamerica. It is there averred that the latter corporations owned, controlled and operated each of these subsidiaries. As heretofore pointed out, plaintiff charges that as the result of a series of various alleged wrongful acts both Transamerica and also in some greater or lesser degree, these numerous subsidiaries sustained substantial losses.

In the light of the allegations and admissions in her pleading, and in view of the circumstances and conditions to which attention previously has been directed, we are persuaded that before it can be held that plaintiff has a cause or causes of action against the defendants or any of them, and likewise before it can be determined that any such cause or causes of action may be filed at this late date, it will be necessary for plaintiff to allege other matters besides those pleaded in her second amended complaint.

The parties herein sued are entitled to be informed whether plaintiff claims that not only Transamerica but also each and all of these twenty-six subsidiaries, or if only some then which of the latter, acquired all of the capital stock and all of the assets and assumed all of the liabilities of Bancitaly corporation, including the alleged fraudulent salary agreement. Likewise, they ought to be apprised whether she asserts that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, entered upon their books credits and disbursed funds on account of the provisions of said agreement. Furthermore, they should be informed respecting the ultimate facts upon which the pleader bases her charges to the effect that said agreement and the other transactions mentioned were fraudulent, fictitious and pretended, and without legal right or authority. In addition they are entitled to be advised whether plaintiff claims that not only Transamerica but also each and all of these subsidiaries, or if only some then which of the latter, participated in the remaining series of alleged wrongful acts, including the so-called Walston and Company transactions, the Pacific Mortgage Company dealings, the so-

called Smith and Mallory trust syndicate transactions and the stock market manipulations.

Again, and for similar reasons the defendants are entitled to have plaintiff disclose whether she claims that all of them and also all of said forty-four other persons listed as having served at one time or another as directors of Transamerica, or if only some then which of them, held and exercised control of all of the issued and outstanding voting shares of capital stock of Transamerica, and also to set forth the ultimate facts upon which she bases such conclusions. Likewise, these litigants should be informed whether the pleader asserts that all of the defendants and all of the aforementioned forty-four other persons, or if only some then which of them, elected and completely dominated and controlled the several boards of directors of the latter corporation, and also should be given the ultimate facts upon which she bases these conclusions. In addition the litigants ought to be advised whether plaintiff asserts that each and all of the defendants, or if only some then which of them, had knowledge of the facts which she claims constitute the alleged frauds, etc., complained of, also whether such knowledge was actual or constructive, and when it is contended such knowledge was acquired.

Finally and upon similar grounds we believe that the defendants are entitled to have plaintiff state whether she claims that each and all of the defendants, or if only some then which of them, were conspirators, also which if any of the defendants were puppets but not conspirators, also which if any of them were neither conspirators nor puppets but failed to discover the alleged wrongful acts complained of, and which of the defendants though

neither conspirators nor puppets discovered such alleged wrongful acts and failed to take action thereon.

Plaintiff has amended her complaint twice. In view of this fact, and of the other circumstances and conditions previously noted, we have concluded that each and all of the respective motions to dismiss should be granted. We have further concluded that the appropriate procedure would be, instead of granting plaintiff unconditionally the right to file another amended complaint, to prescribe the conditions upon which she may apply for leave to file a third amended complaint.

Dated April 16, 1943.

Copies to counsel.

No. 10625

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of TRANSAMERICA CORPORATION and in behalf of all other shareholders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, *et al.*,

Appellees.

Supplemental Brief of Appellee Bank of America National Trust and Savings Association, as Administrator C. T. A. of the Estate of John M. Grant, Deceased.

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Appellees.

Supplemental Brief of Appellee Bank of America National Trust and Savings Association, as Administrator C. T. A. of the Estate of John M. Grant, Deceased.

Introductory.

This brief is supplementary to the general brief filed herein on behalf of all of the appellees. Its purpose is to present a single point particularly applicable to the appellee Bank of America N. T. & S. A. as administrator c. t. a. of the estate of the deceased director, John M. Grant, and not presented in the general brief.

THE ARGUMENT.

Failure of the Complaint to Show That a Claim Was Filed With Bank of America, as Administrator of the Estate of John M. Grant, Deceased, Required Dismissal of the Action.

It is alleged in the second amended complaint that John M. Grant was a director of Transamerica from February 15, 1932, to March 15, 1941 [Tr. p. 158], that he died on or about March 25, 1941, and that the defendant Bank of America National Trust and Savings Association was duly appointed and qualified as administrator c. t. a. of his estate. [Tr. p. 148.] The action was commenced April 16, 1941. [Tr. p. 484.] It is not alleged that any claim was filed or presented to the appellee bank as administrator. This deficiency was assigned as one of the particular grounds upon which the appellee bank moved to dismiss the complaint for failure to state a claim upon which relief could be granted. [Tr. p. 238.]

A. NO SUIT MAY BE MAINTAINED WITHOUT PRIOR PRESENTATION OF A CLAIM TO THE ADMINISTRATOR.

“All claims arising upon contract, whether they are due, not due or contingent, and all claims for funeral expenses must be filed or presented within the time limited in the notice [to creditors], or as extended by the provisions of Section 702 of this Code, and any claim not so filed is barred forever unless it is made to appear by the affidavit of the claimant to the satisfaction of the Court that the claimant had not received notice by reason of being out of the state, in which event it may be filed or presented at any time before a decree of distribution is entered.”

Calif. Probate Code, Sec. 707.

“If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim with the clerk or present it to the executor or administrator * * *, and no recovery shall be had in the action unless proof is made of such filing or presentation.”

Calif. Probate Code, Sec. 709.

“No holder of a claim against the estate shall maintain an action thereon unless the claim is first filed with the clerk or presented to the executor or administrator”

except that the holder of a lien may enforce it where recourse to other property of the estate is expressly waived in the complaint.

Calif. Probate Code, Sec. 716.

In the absence of an allegation that a claim has been filed or presented, the complaint states no cause of action.

Roach v. Hostetter, 48 Cal. App. (2d) 375, 119 Pac. (2d) 749.

That was an action to recover on covenants of a deed. The Court said:

“The complaint contains no allegations of any claim ever having been filed against the estate of decedent. An allegation of the filing of a complaint and the rejection thereof is necessary in an action against an estate. Prob. Code, §716.

“Any claim arising upon contract, whether due, not due, or contingent, must be filed as required by the Probate Code or the same is barred forever.

Prob. Code, §707; Estate of Grant, 2 Cal. (2d) 661, 43 P. (2d) 266; *Id.*, Cal. App., 34 P. (2d) 495; Morrison v. Havens, 24 Cal. App. (2d) 504, 75 P. (2d) 515.

“Therefore, we do not think the complaint states any cause of action for any of the alleged unperformed covenants of the decedent.”

B. THE CLAIM SET FORTH IN THE SECOND AMENDED COMPLAINT IS ONE “ARISING UPON CONTRACT.”

As to John M. Grant, it is not alleged that he received any of the money of Transamerica or its subsidiaries. Every wrongful act he is alleged to have committed is such an act as only a director could commit. Every non-feasance alleged is a mere failure to perform official duty as a director. In fact, it is alleged [Tr. p. 150 *et seq.*] that the defendants conspired to use their positions as directors of Transamerica to consummate the “corporate transactions and acts” complained of. [Tr. p. 153 *et seq.*] Therefore, notwithstanding that the complaint alleges the acts and omissions of the deceased director, John M. Grant, were fraudulent and done in conspiracy with others, the action and the claim set forth in the complaint arise upon contract within the meaning of California Probate Code, Section 707.

Morse v. Steele, 149 Cal. 303, 86 Pac. 693;
DeLeonis v. Etchepare, 120 Cal. 407, 52 Pac. 718;
Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228, 90 Pac. 39;
Garcelon v. Commercial Travelers Ass’n, 184 Mass. 8, 67 N. E. 868.

In *Morse v. Steele* it was alleged that under an agreement with plaintiff the deceased received possession of certain animals and agreed to take care of them and on certain conditions return them to the plaintiff, but that the deceased neglected to care for the animals, whereby they were lost and never returned to plaintiff. The Supreme Court said:

“To meet this, appellant contends that the cause of action set forth in the complaint is not for breach of contract, but is for tort pure and simple, and that the presentation of a claim is therefore not necessary. This position is untenable. The complaint sets up the contract, alleges performance upon the part of plaintiff, and avers that Steele in his lifetime, and afterwards defendant as executrix, failed and neglected to take care of the animals, and that by reason of such failure and neglect they were lost or destroyed, and that they had never been returned to him, to his damage in the sum of eight thousand dollars. Though not expressed, it was the implied duty of Steele in his lifetime, and of the executrix, to have returned the stock at the expiration of the bailment, and this duty itself arose under the contract, as explicitly as though it had been expressly provided for. The complaint avers that ‘immediately after said contract was executed and in pursuance thereof’ plaintiff delivered the livestock to Steele, and the case is, in all its essentials, like that of *Chapman v. State of California*, 104 Cal. 690 [38 Pac. 457, 43 Am. St. Rep. 158], where the harbor commissioners of San Francisco had received upon the wharves of the city coal of the plaintiff. While the coal was upon the wharf it broke, ‘by reason of the negligence and carelessness of the defendant, its officers and agent, . . . in failing and

neglecting to keep said wharf in good and sound condition and repair,' and the coal was sunk in the bay and lost to plaintiff. The action was against the state. If it was in tort, plaintiff was not entitled to recover. This court, after so stating, declared: 'But we are clearly of the opinion that the cause of action alleged in the complaint is not of this character. It is not founded upon negligence constituting a tort, pure and simple, and unrelated to any contract, but is substantially an action for damages on account of the alleged breach of a contract . . . We are entirely satisfied that the plaintiff's cause of action, as alleged in the complaint, arises upon contract.' In *Stark v. Wellman*, 96 Cal. 400 [31 Pac. 259], the first count of the complaint averred that plaintiff delivered to defendant, at his special instance and request, a package containing six hundred and fifty dollars in coin, in consideration of which defendant undertook and agreed to take due and proper care of it, and to deliver the same to plaintiff upon demand. It charged that defendant did not take due and proper care of said package, but so carelessly conducted himself with respect thereto that it was lost through his gross carelessness, and that he failed to redeliver it upon demand. The second cause of action was for conversion of the same package. A demurrer was interposed to the complaint upon the ground that a cause of action arising upon a contract was improperly joined therein with a cause of action for tort. The plaintiff contended that the first count was for a breach of duty imposed by law, and therefore was in tort. This court said: 'This contention cannot be sustained. It is true the owner of property injured by the tortious act of another may sue for the injury in tort, without noticing a

contract with the wrongdoer of which the wrongful act is a violation . . . But there can be no question that he may sue for the breach of a contract, as was done in this case. The duty which the defendant is charged with having violated is expressly derived from the contract.' ”

In *DeLeonis v. Etchepare, supra*, the action was by a principal against his agent to recover money alleged to have been received by the agent and not accounted for. It was held to be an action upon an implied contract within California Code of Civil Procedure, Section 537, allowing attachments in actions upon contracts.

In *Allsopp v. Joshua Hendy Machine Works, supra*, the plaintiff had intrusted property to the defendant as agent for resale and it was alleged that the agent had appropriated some of the property to his own use. There was a prayer for an accounting. It was held that notwithstanding the allegations of conversion of the property, the action was in contract and not in tort.

In *Garcelon v. Commercial Travelers Association*, it was held that a complaint against a fraternal association for rejecting the plaintiff's claim and refusing to make an assessment for payment thereof was upon contract, although the complaint alleged bad faith and a fraudulent purpose.

Mere violation of a contract *where there is no general duty* is not the subject of an action for tort.

Schick v. Fleischauser, 49 N. Y. Supp. 962, 1 C. J. 1016 (Actions, Sec. 139).

Conclusion.

With respect to the appellee bank as administrator of the estate of John M. Grant, we respectfully submit that the judgment of dismissal was proper not only for all of the reasons argued in the general brief of appellees but for the additional reason that no claim was presented against the estate of John M. Grant, deceased.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of
TRANSAMERICA CORPORATION and in behalf of all other share-
holders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI, AMA-
DEO P. GIANNINI (as Executor of the Last Will and Testament of
Virgil D. Giannini, Deceased), BANK OF AMERICA NATIONAL
TRUST & SAVINGS ASSOCIATION, a national banking association
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ELKUS, WILLIAM S. HOELSCHER, CLIFFORD P. HOFFMAN,
C. J. SMITH, VERNON C. WALSTON, AMADEO P. GIANNINI,
L. M. GIANNINI and CLAIRE GIANNINI HOFFMAN, transacting
business as co-partners under the firm name and style of WALSTON
& CO., and AMADEO P. GIANNINI (as the Executor of the Last
Will and Testament of Virgil D. Giannini, a deceased member of said
co-partnership), WALSTON & CO., a co-partnership and TRANS-
AMERICA CORPORATION, a corporation,

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DEC 26 1944

PAUL P. O'BRIEN,

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No. 10625

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of TRANSAMERICA CORPORATION and in behalf of all other shareholders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, L. M. GIANNINI, A. H. GIANNINI, AMADEO P. GIANNINI (as Executor of the Last Will and Testament of Virgil D. Giannini, Deceased), BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, a national banking association (as Administrator-with-the-Will-Annexed of the Estate of John M. Grant, Deceased), GORDON GRAY, O. D. HAMLIN, T. W. HARRIS, A. P. JACOBS, F. C. STEVENOT, RUSS AVERY, P. A. BRICCA, GEORGE J. DE MARTINI, W. N. LAGOMARSINO, A. J. SCAMPINI, WILLIAM E. BLAUER, LEON BOCQUERAZ, E. H. CLARK, CHARLES N. HAWKINS, W. F. MORRISH, A. J. MOUNT, AL FRED E. SBARBORO, CHESTER H. LOVELAND, P. C. HALE, JAMES A. BACIGALUPI, ARMANDO PEDRINI, GEORGE A. WEBSTER, E. J. NOLAN, C. R. BELL, W. W. GARTHWAITE, GEORGE N. ARMSEY, LOUIS FERRARI, V. SCIALOJA, THEODORE M. STUART, HERBERT E. WHITE, CHARLES DE Y. ELKUS, WILLIAM S. HOELSCHER, CLIFFORD P. HOFFMAN, C. J. SMITH, VERNON C. WALSTON, AMADEO P. GIANNINI, L. M. GIANNINI and CLAIRE GIANNINI HOFFMAN, transacting business as co-partners under the firm name and style of WALSTON & CO., and AMADEO P. GIANNINI (as the Executor of the Last Will and Testament of Virgil D. Giannini, a deceased member of said co-partnership), WALSTON & CO., a co-partnership and TRANSAMERICA CORPORATION, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF

Introductory Remarks

In presenting this brief we have in mind not only the importance of the case to the parties but also the great

necessity of uniformity of decision in the application of the Civil Rules of Procedure.

It will be noted that although the rules of Civil Procedure for the District Courts of the United States were promulgated to reform and make simple, among other procedures, the manner of "pleading" yet some conflict appears in the decisions even in applying these simple rules. In some instances the courts seem reluctant to discard the former theory of pleading with its many technicalities concerning "ultimate facts", "evidentiary facts," and so called "conclusions of law".

The "pleading" which is involved in this case was prepared according to the views expressed in the decisions which, in our opinion, reflect the sound meaning of the reformed practice. We call attention to this point as a large part of appellee's brief is based upon "technicalities" of pleading which we thought removed from that field of procedure.

We have also devoted, in our effort to be helpful, considerable space to a discussion of the doctrine of "laches", as distinguished from the statute of limitations, in cases lying wholly within the exclusive equitable jurisdiction of the court.

It will be noted that many of the decisions, wherein a State statute of limitations is applied in a Federal court, the basis thereof was the Conformity Act, (28 U. S. C. A., Section 724) which limited the application of the statute to common law actions and was not binding upon the Federal Courts in the administration of equity. The fact that the Conformity Act has or may be superceded by the Federal Rules of Civil Procedure would seem to make no change in the administration of the "doctrine of laches" in equitable proceedings.

The point presented by appellees that appellant's pleading is defective because the corporate departments and agencies of the Transamerica Corporation are not made parties to the action is based upon a misapprehension of the appellant's "pleading", and the erroneous assumption that she is seeking to recover on behalf of such instrumentalities. This is not the case.

Permit us to suggest that appellees' brief is filled with matter which seeks to divide appellant's "claim" into parts and destroy each one by one. This is done in face of the fact that appellant's action is one to *judicially establish a trust relationship between the appellees as trustees and the defendant "Transamerica Corporation" and its shareholders as beneficiaries, coupled with an accounting for secret profits and corporate losses.* We have at times characterized our action as one for an accounting but the fact that it is actually one to establish a trust should not be overlooked, especially in considering the appellees' attempt to segregate it into independent claims in order to destroy it by the misapplication of academic principles of law.

In presenting our closing argument we shall endeavor to give a definite reply to each of the authorities cited and points urged by the appellees except such points and authorities which are obviously without merit or refer to the practice of the court prior to the adoption of the rules of civil procedure.

We submit the following argument and authorities:

Relating to Appellees' "Statement of the Case."

(Appellees' Br. pp. 3-26.)

Appellees refer to appellant's "Statement of the Case" set forth in her opening brief as "definitely inadequate." (Br. p. 3.) We respectfully, but firmly, assert that appellees' "Statement of the Case," in many respects, is an overstatement of irrelevant matter used as a basis for argument beyond the scope of the points involved.

It is our position that certain of the proceedings in this action, relied upon by appellees, have no place in this appeal. *No ruling was made and no order granted* in the hearing upon appellees' motions directed to appellant's first amended complaint.

The statements of the court and the replies of counsel with respect to a "separate statement of claims" were all directed toward the first amended complaint *and the situation as it then existed*. We know of no authority and none is cited by appellees wherein either court or counsel by merely engaging in informal discussion concerning a pleading presently before the court restricts the basic right of a plaintiff, where general permission is granted, to thereafter choose a different legal theory of his client's case based upon facts *subsequently discovered*, and present the same for consideration upon the merits.

It will further be observed that the trial court made no order and gave no direction to the effect that appellant's complaint should be divided into several "statements of claims" *as a condition* for the filing of her second amended complaint.

The statements of the court with respect to such subject and counsel's replies relate solely to the situation as it appeared from the facts *then* disclosed.

This is definitely demonstrated by the minute order entered at the close of the argument on the motions directed to the first amended complaint which is as follows [R. p. 142]:

“The court makes a statement *re its present views*. It is ordered that the plaintiff serve and file amended complaint within sixty (60) days and that the defendants have thirty (30) days thereafter to plead thereto.” (Italics ours.)

The court limited its statement to its *present* views but did not bring the same forward as a condition of the order permitting the amendment. The court reserved the right to change its views. We should have the same right and with like grace we respectfully submit that counsel’s statement to the effect that: “We have no objection to separating our complaint into counts * * *” was directed only to an action founded upon the facts as *first* known and presented in appellant’s first amended complaint.

It is clear that if appellant had filed a second amended complaint in violation of an order of the court it would have been stricken from the files upon motion of the court or that of the appellees. This did not occur. The appellant’s second amended complaint was tested on its merits by appellees’ motion to dismiss and other motions, including “A Motion to Separately State Claims” *upon which the trial court made no ruling*. There is not a word nor a sentence within the “Memorandum of conclusions” of the trial court which in any manner indicates that the filing of appellant’s second amended complaint was in violation of a court order nor that the appellant’s motions to dismiss were granted upon such ground.

We do not feel justified in using our space upon an argument of this character but before passing to another subject we direct the court's attention to the statement made by counsel to the court at the time appellant's second amended complaint came before the court upon appellees' motion to dismiss. Our statement as paraphrased by the trial court is as follows [Appellees' Br., Appendix pp. 13-14]:

"In justification of this type of pleading plaintiff's counsel, during the oral argument upon the pending motions, asserted *that subsequent to the entry of the order granting leave to file a second amended complaint certain matters had come to their attention which had induced them to adopt a different legal theory respecting this litigation, and it was accordingly upon this new theory that the present complaint had been drawn.* Such different theory, counsel *explained* was to the following effect.

"The first amended complaint was based upon the proposition that two of the defendants and a third person since deceased (whose legal representative was joined as a defendant) had conspired to acquire control of Transamerica and its affairs, that pursuant to such conspiracy, they had selected its directors, dominated its affairs and caused its directors to commit various breaches of their trust or fiduciary obligations and that in furtherance of such conspiracy various overt acts had been committed at the time, in the manner and in the particulars therein pleaded, causing damages to Transamerica in the respective amounts therein alleged. On the other hand, the second amended complaint was prepared upon the theory that all of the persons who at any time had

served as directors of Transamerica had conspired to commit the aforementioned breaches of their trust or fiduciary obligations, that in furtherance of such conspiracy certain overt acts had been committed at the times, in the manner and in the particulars therein pleaded, causing damages to Transamerica, its subsidiaries and departments in the respective amounts therein alleged, and that such of the defendants as had never served as directors were joined upon the theory that they had aided their co-defendants in committing one or more of the alleged breaches of trust.

“It is the contention of plaintiff’s counsel that but a single conspiracy has been pleaded in the second amended complaint; that all of those directors and any others who at any time allegedly entered such conspiracy are equally liable regardless when, if at all, they served as directors of Transamerica; also, that it is immaterial when the different alleged overt acts were committed or when damages resulted therefrom; and that even though it may be pleaded that different defendants, acting either as directors or otherwise, entered the alleged conspiracy at different times, nevertheless, according to the allegations of said complaint, they are charged with having adopted the entire, single, illegal scheme, and hence all defendants are equally liable for all wrongs committed, including not only those perpetrated before they became directors or before they otherwise aided the alleged conspiracy, but also for all the various wrongs asserted to have been committed after they had ceased to be directors of Transamerica, or otherwise had terminated their connection with the enterprises claimed to have been involved with said conspiracy.”

It will be observed, even from this paraphrased version, that our remarks with respect to the second amended complaint are merely explanatory of the appellant's case *then* before the court *and are not addressed to a claimed violation of any alleged prior order of the court*. They were considered by the court as part of our argument in support of the sufficiency of the pleading. The court, as stated by appellees (Br. p. 23), ruled against appellant's views with respect to separately stating claims. As appellees' motions in that regard were not passed upon, we assigned the court's conclusion as error in this respect. (Op. Br., Point V, specification (1), p. 41; Point VI, specification (1), by reference, p. 41; Point VII, specification (1) by reference, p. 42.)

Our argument with respect to said specifications of error appears as part IV of appellant's Opening Brief, pp. 97-111. We again assert that our general view of appellant's case as paraphrased by the trial court constitutes an accurate statement of the law as applied to appellants' second amended complaint.

The colloquy between court and appellant's counsel was not designated by us as part of the record on appeal and we entertain a definite view that none of the oral argument before the trial court is binding upon this court nor upon counsel and has no relevancy to the sole and only ruling of the court to the effect that the motions to dismiss be granted while all other motions remained undetermined. Under the present circumstances, however, we feel justified in suggesting to the court that, in the event the point here presented by appellees is considered material, appellant should be entitled to amend the record on appeal to show the entire comments of the court and

the complete replies of counsel upon that subject, as the court's paraphrased version thereof does not, in our opinion, fully express the nature and extent of the subject as then treated.

Replying to Appellees' Argument No. I.

(Br. pp. 27-36.)

This appeal presents no issue nor does our opening brief present any argument with respect to appellant suing on behalf of the corporation. Such is the very basis of appellant's action. We have not overlooked this principle. We seek to enforce it.

We see but two things inferred by appellees' argument here discussed, (1) that a different and more strict rule of pleading prevails in a shareholder's "derivative action" where the plaintiff is the owner of a small number of shares than it does in a case where the plaintiff is the owner of a large number and (2) the obvious inference that appellant's action is to cultivate a fertile field in which to grow an exorbitant fee for her attorneys.

We submit that neither argument is valid. The rules of pleading are not discriminatory. They apply alike to all. Pleading is now governed by the "Federal Rules of Procedure" and not by State practice nor former decisions which conflict therewith. (This subject is discussed in our opening brief at pp. 43-68.)

It is true that some of the courts have given some consideration, under the circumstances of a particular case, to the fact that a plaintiff owns but a small amount of the capital stock of the corporation which he seeks to protect. But the rules of pleading are not altered. No case

is cited by appellees nor, to our knowledge, does any case exist wherein a decision *turns* upon such fact. It is only mentioned in conjunction with other *fatal* defects in pleading or proof.

As counsel for appellees have seen fit to infer that appellant's counsel, if successful, will obtain, by court order, an excessive fee we feel justified in directing attention to *judicial recognition* of the difficulties, discouragements and *their causes* which confront minority shareholders in derivative actions and the nature and extent of the work required by attorneys in prosecuting such actions. *This judicial recognition is especially applicable to the appellant in the present action.* We refer to the remarks of Justice Davis in the case of *Dresdner v. Goldman-Sachs Trading Corp.*, 269 N. Y. S. 360, wherein certain motions to dismiss on the ground of "another case pending" were denied. At page 364 of the Opinion, the court states:

"The absence of direct authority on the question here presented may indicate that for a long period of years the right of *any* stockholder to invoke the aid of the courts in his individual action has gone unchallenged. However, stockholders in large corporations are, *as a matter of common knowledge, generally uninformed*, and in a measure indifferent concerning the management of the corporation. Generally, *without inquiry*, they sign proxies as a matter of course so that directors and officers may be re-elected and their policies may be continued. When dividends cease and the stock becomes comparatively worthless, they may complain and grumble, *but rarely will they resort to the courts for a remedy*. The reason for such inertia is readily found. Stock-

holders are widely scattered and have no definite method of contract with each other. *They usually know that the evidence is almost exclusively in the control of those who are charged with delinquency; that those same individuals are likewise in control of the funds of the corporation and may apply them in defense of their acts, whether those acts are innocent or wrongful; that in seeking a remedy the stockholder will be met with every obstacle and procedural delay that the ingenuity of skilled counsel can devise, as is illustrated in the present case; and that the litigation must entail on their part a great expense with the eventual result in doubt. So, unless a group is organized by ambitious counsel, or one or more stockholders have great courage and ample means to maintain a long-continued litigation, the stockholders remain quiescent, accepting their misfortune as a decree of relentless fate. It is only in times of general cataclysm or great stress, like those of the present, that indignation will flare up into some decisive action. Common experience tells us that, when officers and directors of a wrecked corporation are called to account, they are not eager to go to an early trial on the merits—whatever the merits may be. There is great reluctance to furnish the evidence of their acts of management and make disclosure of books and records. The way of the inquiring stockholder is beset with difficulties and discouragements created chiefly by those whose acts are attacked. Such, in brief, is the background of the average stockholder's action as we view it."*

It is within such difficulties and hazards assumed by minority shareholder in a derivative action that we, too, go afield of the record to show the nature and extent of

the work required to obtain *precise* information regarding *concealed facts which are wholly within the knowledge of the appellees*.

It is in the light of such a situation that we ask the court to consider and pass upon the form and sufficiency of the allegations contained in appellant's second amended complaint in order that the pleading may be construed as to do substantial justice. (Rule 8(f).)

If, as said by appellees, appellant is the guardian *ad litem* of the "corporation" the corporation is an "incompetent" whose rights should be regarded with at least reasonable liberality.

The facts set forth in appellant's "pleading" are admitted by the motions. They are not altered nor weakened by the number of shares of capital stock held by appellant nor by the amount of the attorney's fees which, in the event of success, may be awarded her attorneys.

In the case of *Dannmeyer v. Coleman*, 11 Fed. 97, cited at page 31 of appellees' brief, the action, under the facts there averred, was held barred by lapse of time upon the ground that the means of knowledge were open to the shareholders more than 3 years prior to the filing of the action and the complaint was wholly insufficient because it failed to show a case for the jurisdiction of the court and also failed to allege an excuse for not making a demand for action by the directors. The decision did not *turn* upon the number of shares of stock held by the plaintiff.

The rule with respect to a "very clear case" mentioned in 4 Thompson Corporations (2d ed.) 1034, Sec. 4566, cited at page 32 of appellees' brief, finds support in a case

where the act *was not ultra vires nor fraudulent* but was one of business judgment.

In the case of *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq., 340, cited by appellees at page 32 of their brief, the acts of the directors for which relief was sought were not *ultra vires*, they constituted a "corporate policy" only as distinguished from *fraudulent* or other *ultra vires* acts. The facts in that case are far apart from those in the present action and the question of pleading there involved is not here presented.

The case of *Wenberger v. Quinn*, 35 N. Y. S. (2d) 567, cited at page 36 of appellees' brief does not involve *ultra vires* or *fraudulent* acts on the part of the managing directors of the corporation but involves only a question of mere business judgment or expediency. The case is not in point, the pleading is entirely different and its deficiencies do not appear in the pleading under discussion.

When carefully analyzed the expression "a very clear case" and "suspicious circumstances" used by the courts in said cases has very little meaning when applied to pleadings. Rules with respect to pleadings are and must be uniform and cannot be tested by the amount of a plaintiff's investment. Such expressions may have some place in cases which have been tried upon their merits and where other fatal deficiencies appear to which they may be applied.

With respect to the subject here discussed regarding the small amount of shares held by the appellant in the defendant corporation we point out that in one of the early important derivative suits, namely *Dodge v. Woolsey*, 59 U. S. 331, decided in December, 1855, the plaintiff was

the owner of but thirty (30) shares of the Commercial Branch Bank of Cleveland, which was a branch of the State Bank of Ohio. It may also be observed that he was successful in the prosecution of the suit which resulted in a permanent injunction against a tax collector which the directors, *in violation of their duties*, refused to prosecute.

We respectfully but firmly urge that appellees' "Argument No. I" is not an effective answer to any portion of appellant's opening brief and especially that portion which discusses the new rules of pleading and the decisions thereunder. (Op. Br. pp. 43-68.)

At page 29 of appellees' brief, the following statement is made:

"A stockholder has no vested right to represent the corporation. Rather it is a privilege dependent upon procedural statutes or rules."

This statement, which appellees seek to support by the District Court decision in *Perrott v. United States Banking Corporation*, 53 Fed. Sup. 953, 956 and *Klum v. Clinton Trust Co.*, 48 N. Y. S. (2d) 267, 268, is obviously made for the purpose of attempting to avoid the rule of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, by reason of which the substitutive law of the State of Delaware governs this case with respect to the rights of the parties.

In view of the doctrine announced in *Bachus-Brooks v. Northern Pacific Railway Co.* (8th Cir.), 21 Fed. (2d) p. 4, it is clear that appellees' statement to which we have referred is, indeed, erroneous. It entirely ignores the equitable interest which the shareholder has in his

corporation. It fails to comprehend the fact that a shareholder's "derivative suit" is a creature of equity established to grant relief for the character of wrongs presented in the present case and which has existed in England and in this country by an unbroken line of decisions long prior to the decisions in *Dodge v. Woolsey*, 59 U. S. 331, wherein it is stated at page 341 as follows:

"It is now no longer doubted, either in England or the United States, that courts of equity, in both, *have a jurisdiction over corporations, at the instance of ONE or more of their members*; to apply preventive remedies by injunction to restrain those who administer them from doing acts *which would amount to a violation of charters, or to prevent any misapplication of their capital or profits*, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise of a corporation, *if the actions intended to be done created what is in the law denominated a breach of trust*. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an interpreted violation of a corporation franchise, or the denial of a right growing out of it for which there is not an adequate remedy at law. 2 Russ & Mylne Ch. R., *Cunliffe v. Manchester and Bolton Canal Company*, 480, n; *Ware v. Grand Junction Water Company*, 2 Russ & Mylne, 470; *Bagshaw v. Eastern Counties Railway Company*, 7 Hare Ch. R. 114; *Angell & Ames*, 4th ed. 424, and the other cases there cited."

Rule 23 (b) has nothing to do with the substantive equitable nature of derivative actions. It merely enacts

into a court rule the former decisions of the courts with respect to certain conditions which must exist in order that a shareholder may be qualified to represent the corporation in a suit of that nature but, being qualified, the action involves the complete and full exercise of an equitable right and must, in the present case, be governed by the substitutive law of the State of Delaware. We find nothing in the decisions cited by appellees in support of their said statement which in any manner conflicts with our foregoing observation upon the subject.

At page 33 of appellees' brief the following statement appears:

"Throughout her brief appellant has overlooked these principles. She treats the case as if she were the owner of the alleged cause of action as if she were here suing to enforce her individual rights."

It is perhaps unnecessary to answer the foregoing statement as the prayer of appellant's pleading and the plain and simple averments thereof constitute a complete reply.

In a footnote at page 33 of appellees' brief, the case of *D. E. Loach v. Crowleys Inc.*, 128 Fed. (2d) 378, 380 is cited in an attempt to support certain remarks of the trial court in its "memorandum of conclusions," concerning which we make comment at pages 66 and 67 of our opening brief. Appellees', in their footnote, in stating that in making the remarks in question the trial court apparently had in mind the principal laid down in the *Loach v. Crowleys Inc.* with respect to expensive trials of meritless claims which may be avoided by pre-trial and summary judgment procedures, fails to point out that appellant's case is not before the court upon pre-trial or

summary judgment procedure. Counsel for appellees fail to recognize that the point presented by the appeal is the sufficiency or insufficiency of appellant's pleading the admitted allegations of which do not disclose a meritless claim but on the other hand show an enormous wrong. We still feel that our comment with respect to the trial court's observations in question, mentioned at pages 64, 65, 66 and 67 of our opening brief are proper and have a rightful place in showing the error of the trial court in its ruling and judgment given herein.

Appellant's Reply to Appellees' Argument No. II.

(Brief pp. 37-58.)

That part of appellees' argument which attempts to indicate that appellant, in filing her second amended complaint, violated an order of the trial court is, as heretofore shown, unfounded. It is discussed by us only because of appellees' attempt to create such an order by an unwarranted interpretation of a colloquy between court and counsel. We again assert that the statement made by counsel for appellant to the court during informal discussion in question (Br. p. 13) that he had "no objection to separating our complaint into counts on the various statements of the claims" referred only to the appellants' action as then expressed in her first amended complaint and did not contemplate *subsequent discoveries of facts* which fully justify the allegations of the second amended complaint. Counsel's full duty toward his client which requires him to submit her case upon *all the facts* upon which he is informed and adopt a legal theory of recovery based thereon *exists at all times* and cannot be so easily cast aside as appellees have attempted to persuade

the court to do. The trial court did not consider that an order was violated by appellant in filing the second amended complaint. The motions to dismiss were heard and determined *upon the merits of that complaint*. The court did not attempt to obstruct the full rights of the appellant to state her case upon and according to her own theory and upon all the facts which were available to her. To the effect that a litigant has such right which cannot be erased, at least by unwarranted inference, needs no authority for support.

At page 39 of appellees' brief, the case of *Lofland v. Cahall*, 13 Del. Ch. 384 is cited to the effect that officers and directors of the corporation are held to a fiduciary standard applicable to *trustees* and for some purposes will be treated as trustees for the stockholders collectively "which is only another way of saying that they are trustees for the corporation." We agree to this principle of the Delaware law and urge its full and complete application upon all phases of appellant's case. From this doctrine it must be held that the right of action of the corporation against its managing directors *as sought to be enforced by appellant as a shareholder* can only be one for an accounting irrespective of the nature and extent of the items involved, as they were all parts of one general enterprise and sprang from *one* series of operations which by their very nature require an accounting, and consist of but a single cause of action.

Kilbourn v. Sunderland, 130 U. S. 505, cited at page 102 of our Opening Brief, is a complete answer to appellees' argument concerning "separate statements of claims." This decision is quite sufficient to reverse the trial court upon this part of its ruling. Appellees' answer

to this citation, found at page 45 of their brief, evades its effect.

The case of *Czwerdinski v. Bent*, 11 N. Y. S. 208, cited at page 39 of appellees' brief, is not in point. The statement of the court, relied upon by appellees, to the effect that the corporation could have brought an action at law for money had and received was merely hypothetical *for the purpose of applying the Statute of Limitations* upon the theory that the shareholder had no greater right than the corporation. The case involves no factual complexity requiring an accounting. The decision does not hold that the shareholder's derivative suit for an accounting was in any manner changed by reason of the announced doctrine. It was a limited announcement, restricted only to the application of the statute of limitations.

This is the precise situation in *Dunlop's Sons, Inc. v. Dunlop*, 18 N. Y. S. (2d) 818, also cited at page 39 of appellees' brief. The case is distinguished by the following statement of the court (Opinion p. 820):

"The wrong pleaded is not a claim for profits in the sense in which that term is properly used in stockholders' actions."

The same distinction exists in the case of *Singer v. Carlyle*, 226 N. Y. S. (2d) 320, also cited at page 39 of appellant's brief and in *Wallace v. Lincoln's Savings Bank*, 89 Tenn. 630, cited at page 40.

Throughout appellees' brief there is no decision cited nor mentioned which directly or by inference decides that a shareholders "derivative suit" is not one for an accounting. Neither do appellees refer to any authority which, in such an action, requires a plaintiff to state in separate counts the items of wrongdoing.

Appellees in their effort to convince the court that appellant's complaint is founded upon several claims (Br. pp. 38-57) refer to the "salary agreement" item, and states (Br. p. 41),

"the validity of agreements providing for incentive compensation is now too well settled to be successfully assailed as wholly void by any such applications as those mentioned"

and thereby evades the real fact presented by appellant's pleading to the effect that it was the profits obtained by the *fraudulent use* of the agreement for which appellant seeks an accounting. It is the only thing appellant can do to protect the "corporation" and this is true even though in an academic sense the corporation acting through an innocent board of directors *might* have maintained an action at law for money had and received. The form of action which the corporation might institute in no manner alters the necessity and the right of a shareholder to maintain his action in equity as one for an accounting. Appellees, in their argument with respect to the so-called second (2nd) item relating to "Walston & Co." and the alleged fifth (5th) item relating to the disbursement of money in "stirring" the market for Transamerica stock, make the same erroneous argument with respect to the nature of the transactions when considered in the light of relief being sought by a shareholder for the benefit of the corporation in a "derivative action." The equitable nature of such a suit and the fact that it is directed against trustees for an accounting for fraudulent and *ultra vires* acts cannot be changed into an action at law requiring its items separated into counts merely because the corporation could have sued at law upon some of the items involved.

Appellees fail to cite any authority in support of such a proposition.

Appellees in their attempt to show that appellant's second amended complaint should be separated into five separately stated claims also attempt to separate the participants by stating (Br. p. 46)

“Passing over for later consideration the charges of conspiracy it will be observed that the participants in each transaction are not ‘the same individuals.’ ”

The error in this observation is that in point of law, under the *admitted facts* set forth in appellant's pleading, the participants in each item of the transaction *are* the “same individuals”.

At pages 43 and 44 of their brief, appellees refer to the case of *Bremner v. Leavitt*, 109 Cal. 130, which appellant discusses at pages 98, 99 and 100 of her opening brief, and quotes therefrom a portion of the decision which appellant overlooked, *and which omitted portion is the very essence of the principle for which we contend*. The omitted portion which appellant mentions is here repeated as follows:

“Partners cannot sue one another at law for any breach of duties or obligations arising from that relation. This can only be done in chancery by asking a dissolution and accounting, and, if damages accrue from any cause in such proceeding, they must be adjusted by some appropriate method in that tribunal.”

This statement makes it plain that if injury, called damages, accrued from any breach of duty or obligation arising from a partnership relation the same must be adjusted in chancery by seeking a dissolution and *accounting*. Part-

ners cannot sue one another at law for a breach of duty arising from the partnership relation. This is precisely the situation in the present action. The appellant shareholder cannot sue the delinquent directors to recover damages at law. Such injury can only be adjusted by the appropriate method of accounting in equity.

At page 45 of their brief appellees make some short comments with respect to *Veronia v. Sup. Coal & Ice Corp.*, 290 N. Y. S. 447; *Blake v. Boston Development Co.*, 50 Utah 347, and *Kilbourn v. Sunderland*, 130 U. S. 505, which together with *Bremner v. Leavitt*, *supra*, are discussed by appellant at pages 98 to 103 of her opening brief. Appellees' comments seem wholly insufficient to weaken those decisions as bearing upon and supporting appellant's claim with respect to an action for an accounting being a single action irrespective of the varied nature of the items or transactions involved. We see no reason to enlarge the argument contained in our opening brief upon the subject.

Again we are forced to draw attention to appellees' incorrect statement (Br. p. 47) to the effect that appellant is seeking to recover definite sums for each item mentioned in the pleading. Counsel for appellees have obviously failed to consider the "pleading" with respect to the nature and extent of the injury suffered by the corporation and have also failed to take cognizance of the nature of the injuries whereby a court can only strike a true balance through an accounting according to established practice. There is no other way to reach the complicated matters involved and arrive at a just and correct decree.

As an additional illustration of appellees' erroneous reasoning we refer to page 49 of their brief wherein it is stated:

"But appellant has not charged 'delinquent trustees' with a 'general wrong'. No single substantive wrong is recognized under California law merely because the defendants are 'delinquent trustees'. This is made plain by the provisions of Section 427 of the California Code of Civil Procedure which provides that * * * If separate and distinct transactions became a 'general wrong' because perpetrated by 'delinquent trustees' there would be no reason for the foregoing provision of Section 427 of the Code of Civil Procedure."

Appellees' statement that as "delinquent trustees" they are not charged with a "general wrong" is so definitely incorrect that argument seems unnecessary. The "general wrong" is found by interpreting the appellants' "pleading" as a whole and not by the device of separating the same for the purpose of academic discussion. *The "general wrong" lies in the fact that appellees and their co-conspirators organized, operate and maintain the corporate structure for their sole individual use, gain and profit. The appellants' action on behalf of the "incompetent" corporation is one to compel its delinquent trustees to account for their secret profits and the corporate losses occasioned thereby. There could be nothing more general in its scope than a case of this character. It is directed against each and every individual who served as a director of the corporation and who contacted, aided, abetted and approved the general scheme so far successfully conducted.*

In this regard it must be remembered that appellant's action is not directed against strangers or third persons

dealing with the corporation whereby actions at law may have arisen and which for business reasons or matters of policy the directors deem it unwise to pursue. Appellants' action is directed against all the corporate directors and those who aided and abetted them in performing fraudulent and *ultra vires* corporate acts. We again assert that the substantive law of Delaware governs the law applicable in this case (*Eric Railroad Company v. Tompkins*, 304 U. S. 64) and therefore the directors and officers are express trustees for the stockholders and the corporation (*Cahall, Receiver, v. Lofland*, 12 Del. Chancery 290 at p. 305) and if not so considered by this court yet they became trustees of a constructive trust which was created by their own breach of fiduciary duties. (*Johnston v. McCluney*, 80 S. W. (2d) 898, 2d Syllabus Opinion, pp. 901-902.)

We are not aware that Section 427 of the California Code of Civil Procedure has any applicability whatsoever to the present action. We are here governed and controlled solely by Rule 10(b) of the Federal Rules of Procedure which in and of itself is not mandatory and should not be applied for the reasons cited in our opening brief. (Br. pp. 97-111.)

At pages 50 and 51 of appellees' brief comment is made with respect to the case of *Bowman v. Wohlke*, 166 Cal. 121, upon which appellees appear to greatly rely. Among other things, our reference thereto (App. Op. Br. p. 109) is criticized. We distinguished the case because it is a direct law action against certain individuals to recover damages for malicious prosecution, slander and trespass the redress of which has no place in equity nor in a suit for an accounting for the abuse of a trustee relationship.

Appellees, at pages 51 and 52 of their brief, in criticizing our point, stated:

“But as we have already shown this remark is predicated upon the erroneous assumption that because appellant is before us in equity her position is different from that which would have been the case had Transamerica or its subsidiaries brought the action.”

Concerning the foregoing remark, we respectfully but firmly urge that appellant is in a different position from the Transamerica Corporation and can only maintain a derivative suit in equity of the nature here presented.

We refer to the case of *United Copper Securities Co. v. Amalgamated Copper Co.* (2d Cir.), 223 Fed. 421 wherein it is said (Opinion pp. 422-423):

“We think that a stockholder’s right to assert a cause of action belonging to the corporation depends upon allegations that the corporation is acting fraudulently, in breach of trust, or *ultra vires*. For this reason he must go into equity. On the other hand, there appears to us to be no ground for holding that stockholders may bring actions at law in the name of the corporation to recover money damages or specific property whenever the corporation refuses to do so. *Aimes v. American Telegraph & Telephone Co.* (C. C.) 166 Fed. 820. Such a practice would be likely to create great confusion and tend to take unnecessarily away from the corporation the management of its own affairs.”

The case of *Bachus-Brooks Co. v. Northern Pacific Railway Co.* (8th Cir.), 21 Fed. (2d) p. 4, is a minority stockholders’ action in behalf of the corporation predicated upon the proposition that the Northern Pacific elects

and dominates a majority of the Board of Directors of the corporation for whose benefit the action was instituted and that in the transactions complained of such majority of the Board of Directors failed to faithfully serve the interests of the corporation but on the other hand managed and operated the corporation not for the benefit of its stockholders but for the benefit of the Northern Pacific Railway Co. *The action is one for an accounting and involves many items of wrongdoing.* There is no question of concealment or want of knowledge on the part of the complaining stockholder.

In determining that the statute of limitations of the State of Minnesota did not apply to that character of action (which will be hereinafter discussed under another part of this brief), because the case falls within the *exclusive* equitable jurisdiction of the court uses the following language (Opinion pp. 11-12):

“The alleged *wrongs* complained of are *wrongs* against the Minnesota Company in which the complainant is a stockholder, and except through the corporation such *wrongs* had no relation to complainant. They did not directly injure complainant. Complainant was not affected by such *wrongs* except as every other stockholder was affected. There is no direct legal privity between the complainant, either individually or as a stockholder, and the respondents. As such stockholder, the complainant has an interest in the Minnesota Company and in the conduct of its officers affecting its property, *but this interest is equitable, and not legal, and it gives the complainant no standing in a court of law. Consequently the complainant cannot enforce a cause of action in behalf of the Minnesota Company in an action at law. His sole remedy is in equity.* . . .

“The interest which the complainant seeks to enforce and protect is equitable. It is the existence of this interest which enables complainant to invoke the jurisdiction and aid of a court of equity. Complainants sole remedy for the protection of his equitable interest under the circumstances is in equity. Therefore, usually the case falls within the exclusive, rather than the concurrent jurisdiction of equity.”

We again refer to the case of *Johnston v. McCluney*, 80 (S. W.) 898, wherein the controversy arises out of the sale or disposition by the defendant firm, but without the plaintiff's knowledge or consent, of certain securities owned by plaintiff, which had been purchased by her through the defendant firm but had not been delivered to her, with respect to which the plaintiff sought to have a trust declared in plaintiff's favor for the *amount of the proceeds of the sale with interest and that defendant be required to render a true account to plaintiff of such proceeds* and that judgment be entered against the defendant requiring payment to plaintiff of the total amount found to be due.

The defendant in that case, as in the present case, objects to the sufficiency of the pleading upon the ground that it did not allege facts sufficient to establish jurisdiction in equity for an accounting.

In holding that there was no merit in such objection the court makes the further statement which is precisely applicable to appellants pleading in the case at bar (Opinion p. 902) :

“The basis for equitable jurisdiction in a suit for an accounting is the inadequacy of the legal remedy, and such jurisdiction has particular application in

cases where a fiduciary or trust relation exists. . . .
In other words there must be some distinct ground shown for invoking the jurisdiction of equity to which the demand for an accounting will be fairly incidental or ancillary. since a mere demand for an accounting, unless founded upon some recognized ground for equitable relief, will not serve to establish the inadequacy of plaintiff's resort to law for a remedy. . . .

"In this instance the existence of a fiduciary relationship between plaintiff and the firm, and the creating of a trust in her favor, were sufficiently pleaded as we have already shown; and of course the enforcement of the trust thus created by operation of law was a matter of pure equitable cognizance. But what was the amount of the trust for which defendant is sought to be charged? Plaintiff has pleaded her ignorance of the exact amount of the proceeds of the sale on account of which she asks the accounting of defendant as ancillary to and in aid of the trust which she asks to have adjudged as the basis of her cause of action. It may well be that the account was not a complicated one, and indeed we now know that it was not; but inasmuch as plaintiff's case was otherwise one for equitable jurisdiction, she was fully warranted in asking the court to require defendant as trustee to account for the trust funds in his possession to the end that a judgment might be rendered in her favor for the balance found to be due after taking the account."

As heretofore stated, even though we treat the appellees as fiduciaries as distinguished from express trustees, for the purpose of appellant's action they are one and the same and require an action for an accounting to redress

the wrongs committed whether they be express trustees or trustees of a constructive trust arising from the wrongs. All this is true according to the decision cited irrespective of the involved or complicated nature of the account. In the present case however we can hardly conceive of an account between trustees and beneficiaries being more highly involved or largely complicated.

At pages 49, 50, 51 and 52 of appellees' brief, the following additional cases are cited in support of the argument presented upon this subject, namely:

Kuhn v. Pacific Mutual Life Ins. Co., 37 Fed Supp. 100;

Connor v. Southern Ry. Co., 1 F. R. D. 410;

Chambers v. Nat. Battery Co., 34 Fed. Supp. 834;

American Foman Co. v. United Dye Wood Corp.,
1 F. R. D. 171;

Ingenuities Corporation of America v. Trau, 1 F.
R. D. 578;

Bicknell v. Lloyd-Smith, 25 Fed. Supp. 657;

Green v. Davies, 182 N. Y. 503;

More v. Finger, 128 Cal. 313.

We have carefully examined these decisions and submit each of the same to be wholly inapplicable to the point here under discussion.

The first above mentioned case of *Kuhn v. Pacific Mutual Life Insurance Co.*, 37 Fed. Supp. 100, is *not* a shareholders derivative suit instituted against directors of a corporation for fraudulent and *ultra vires* acts. It is merely an action at law between an individual and a corporation upon an insurance policy to recover several disability benefits which the District Court considered should be separately stated.

The case of *Chambers v. National Battery Co.*, 34 Fed. Supp. 834, is an action to recover damages for libel and slander wherein separate counts were required. This is a Missouri case wherein under the law a jury adjudicates the law in libel cases and the judge declares the law in slander cases. It has nothing whatever to do with the case here presented by appellant's pleadings.

The case of *Bicknell v. Lloyd-Smith*, 25 Fed. Sup. 657, cited by appellees is an *action at law* upon a written guarantee of the payment of corporate bonds. It also has nothing to do with the case such as here presented by appellant. It should take no argument to disclose the inapplicability of this case to the point sought to be made by appellees.

It is likewise true that in the case of *Green v. Davies*, 182 N. Y. 499, relied upon by appellees that the action is one *at law* wherein the court held that a cause of action for slander cannot be joined with one for malicious prosecution. We fail to see its applicability to the pleading here presented.

In the case of *Moore v. Finger*, 128 Cal. 313, cited by appellees the complaint was held to state a cause of action to recover the possession of a note owned by the plaintiff even though it contained a statement that the defendants had converted the note to their own use. We fail to find any similarity between this case and the one under consideration.

The case of *Conner v. Southern Railway Co.*, 1 F. R. D. 410, involves a complaint wherein two causes of action were commingled and set forth in one count of the complaint, one based upon statutory grounds and one based upon common law grounds. Defendant's motion to strike

the said count was granted by reason of Rule 10 (b) and the State Procedure. The decision does not disclose the precise nature of the action but it appears to be an action at law and apparently involves no trust relationship nor request for an accounting for *fraudulent* or *ultra vires* acts nor for the abuse of the fiduciary relationship. We are unable to perceive its applicability to the present action.

In *American Fomon Co. v. United Dye Wood*, 1 F. R. D. 171, the action involves a patent infringement and the recovery of damages for an unlawful appropriation of an invention. The District Judge granted a motion to dismiss by reason of an opinion given by another judge in the same matter at a prior date because, in the opinion of the former judge, he thought the bill "sets forth several causes of action" but did not intimate a view as to the sufficiency of any thereof. The court finally in deciding the case merely reaffirmed the former judge's opinion but granted leave to amend. The case does not seem to involve the equitable features presented in the action at bar.

In the case of *Ingennities Corporation of America v. Trau*, 1 F. R. D. 578, it appears that the complaint as a whole was verbose and vague, the allegations of fraud, deceit and conspiracy were sprinkled indiscriminately throughout and some doubt existed with respect to the diversity of citizenship, creating the possibility that as to some of the claims the court lacked jurisdiction. The precise nature of the action is not disclosed in the decision except that it is one for unfair competition, unfair trade practices, fraud, deceit, conspiracy, infringement, violation of trademarks and violation of license contract and other rights of the plaintiffs. It is apparently an action

between parties dealing at arms' length for damages and possibly injunctive relief. It involves none of the attributes of the present case regarding accounting for trust violations.

At pages 53 to 57 of their brief, appellees discuss and attempt to apply Rule 10(b) to appellant's claim as set forth in her second amended complaint. At the outset of our reply to this argument we mentioned the uncontroverted fact that the record upon this appeal affirmatively discloses that the appellees' several motions for separate statements were not decided. The court made no ruling thereon. The motions stand abandoned. They have no purpose on this appeal except in so far as the subjects thereof might be considered upon the motions to dismiss.

In this connection we cite the following decisions:

In the case of *Winter v. Bostwich*, 212 Fed. 884 (7th Cir.), the complainants moved to amend their bill but the record did not show that any ruling was made on the motion nor that complainants asked for a ruling or assigned error on the ground that the court did not rule. It was held that complainants' right to amend could not be reviewed on appeal *as the question was not before the court for consideration*.

In *General Motors Co. v. Swan Carburetor Co.*, 44 Fed. (2d) 24, 2d Syl., Opinion, p. 25, it is stated:

"Under the well settled practice which we are very often being called upon to apply, we cannot review a finding of fact to see whether it is based on any substantial evidence; *nor can we examine any question of law, unless the point was distinctly presented to the court below and ruled upon*, during the progress of the trial and proper exceptions were then taken."
(Italics ours.)

In *Metropolitan Life Ins. Co. v. Armstrong*, 85 Fed. (2d) 187, 22 Syl. Opinion p. 193, the following language is used:

“In any event there was no ruling on the objection, and hence no exception was saved. In the absence of either a ruling or an exception the alleged error can, of course, not be reviewed.”

In *Gibson v. Luther* (8th Cir.), 196 Fed. 203, at page 204, the doctrine is thus stated:

“As the trial progressed, objections of vital and controlling importance were interposed to the introduction of deeds and other documentary evidence but these objections were not passed upon by the court and no exceptions were saved by either party to any adverse ruling thereon. This precludes review of any of these rulings (objections) as we can act only on exceptions duly saved and assignments of error predicated thereon.”

From the foregoing decisions and many others which could be cited, it is clear that appellant in this case could not predicate error upon any point *unless passed upon by the trial court*. We feel safe in saying that for the purpose of this appeal, at least, each and all of respondents' motions which remained undetermined by the trial court are thereby abandoned including their motion to require appellant to separately state claims. The subjects of each all of respondents' motions which were not passed upon by the trial court (Appellees' Br. p. 19, Subd. 2, 3 and 4) are not involved in this appeal and it is our thought that as we are precluded from a discussion thereof the respondents should likewise be estopped. This means that a discussion of the question concerning separate statements

of several claims by appellant should only be considered upon the merits with respect to appellees' motions to dismiss. This appellees do in their argument Number II (Br. pp. 37-57) in reply to Part IV of appellant's brief, pages 97 to 111.

Just why respondents attempt to claim that appellant violated an order of the trial court in filing her second amended complaint without a separate statement of several claims, in the face of the fact that the question was argued and determined upon its merits by the trial court and is now so argued and presented by appellees, does not appear.

Our position on this matter is that appellant's statement of claim or cause of action if divided and each item treated as an independent claim or cause of action would result in great confusion and directly violate Federal Rule of Procedure 10(b).

Replying to Appellees' Argument No. III.
(Brief pp. 58-92.)

Part "Two" of appellant's opening brief (pp. 69-87) is devoted to a discussion demonstrating the error of the trial court in granting appellees' motions to dismiss on the ground that the action was filed too late. Whether or not the trial court applied the California statute of limitations or the doctrine of "laches" we do not know but we do know that appellees' answering argument to that part of our opening brief is far from a sufficient reply.

Instead of showing the inapplicability or insufficiency of appellant's opening brief, appellees' argument fails

to recognize the admitted concealment of their own wrongs, as alleged in the appellant's pleading, and also fails to discuss the doctrine of "laches" from the viewpoint presented in appellant's brief.

Appellees' entire discussion of this subject consists of and is based upon the incorrect assumption that the point is determined by the California statute of limitations and the California decisions with respect thereto. A plain and frank discussion of the doctrine of "laches" when applied to a concealed fraud involved in a suit only cognizable in equity is completely avoided. We realize and do not hesitate to assert that the courts in some cases refer to a State statute of limitations and the doctrine of "laches" in terms which might convey the thought that they are one and the same. This is not the case. They are in some respects similar but they are not identical.

Statutes of limitations are purely matters of legislative creation, in the absence of which, lapse of time does not of itself constitute a defense to the right to enforce a liability. They are statutes of repose and are enacted upon the theory that one having a well founded claim will not delay for an unreasonable time to enforce it. However, they are arbitrary with respect to the time limited, which is definitely measured by the statute and from which there can be no deviation no matter how justified the same may be from a factual standpoint. On the other hand the doctrine of "laches" is an equitable principle founded in the factual circumstances of each case and based, not upon an arbitrary time limit, but upon the fact that in each case equity requires diligence on the part of a plaintiff in order that a defendant may not be prejudiced by undue delay as demonstrated by the decisions cited in part

two of our opening brief (pp. 69 to 87, incl.). This is undoubtedly the reason that Rule 8(c) requires the defense of “laches” to be pleaded in an answer. The rule is especially applicable in a case of concealed fraud which may be only accidentally discovered.

Appellees’ argument fails to take the elements of “laches” into account and thereby evades a direct answer to appellant’s argument upon the subject.

As we understand the doctrine it is based wholly upon the very early principle that equity demands diligence and lack of diligence constitutes “laches” which is applicable where the adverse party has been misled or otherwise substantially prejudiced. It is our thought, which we firmly urge, that the California statute of limitations is not applicable and that the concealment of the fraud and the circumstances of its discovery by appellant disclosed diligence on their part as distinguished from a lack thereof. Counsel for appellees in their argument with respect to the statute of limitations again seek to divide and destroy plaintiff’s pleading by detailed analysis which views the pleading in a light which is unwarranted *when construed as a whole*.

Appellees in their effort to create some confusion with respect to appellant’s position upon the subject here discussed incorrectly states (Brief p. 58):

“Appellant contends that since, under rule 8(c), it is provided that laches and the statute of limitations must be affirmatively set forth as a defense a motion to dismiss under rule 12(b) is not proper, and cites *Dirk Ter Haar v. Seaboard Oil Company*, 1 F. R. D. 598.”

A statement to this effect does not appear in appellant's opening brief. Our statement regarding the necessity for a trial upon the merits of the defense of laches in the present action upon a formal issue thereof and a full and complete development by evidence of all the facts and circumstances of the case is followed by the following statement which under the circumstances we deem necessary and proper to repeat (Br. p. 84):

"The elements of laches or the absence thereof call for such an investigation. Except in very rare cases where neglect or lack of diligence is *clearly apparent* upon the face of a complaint, such issue is factual. In the present action, appellant desires the appellees to face a trial upon the merits of the controversy that, among others, the issue of 'laches' if properly and sufficiently presented, may be fairly tried and appellant's case not erased by academic interpretation upon 'motions to dismiss'."

We did cite the decision rendered by Judge Beaumont in *Dirk Ter Haar v. Seaboard Oil Company*, 1 F. R. D. 598, wherein the following decisions are cited in support of the court's ruling and which, contrary to appellees' judgment in the matter may constitute the weight of authority, namely:

Patsavouras v. Garfield, D. C. (New Jersey), 34 Fed. Sup. 406;

Munser v. Swedish American Line, D. C. (New York), 30 Fed. Sup. 789;

Holmberg v. Hanaford, D. C. (Ohio), 28 Fed. Sup. 216;

Raker v. United States, D. C. (New York), 1 F. R. D. 432;

Baker v. Sisk, D. C. (Oklahoma), 1 F. R. D. 232;

Nordman v. Johnson City, D. C. (Illinois), 1 F. R. D. 51;

United States v. Earling, 39 Fed. Sup. 864, 5 Fed. Rule Service 105;

United States v. Arthur, 23 Fed. Sup. 537;

Reconstruction Finance Corp. v. Central Republic Trust Co., 11 Fed. Sup. 976.

With respect to the authorities cited by the appellees at page 59 of their brief to which they refer as constituting the weight of authority the following observations may be in order.

The case of *Abraham v. San Joaquin Cotton Oil Co.* (D. C. S. D. Cal.), 46 Fed. Sup. 969, is an *action at law* to recover wages and liquidated damages under the Fair Labor Standards Act and is directly subject to the State statute of limitations by the "Conformity Act."

In the case of *A. G. Reeves, Steel Const. Co. v. Weiss*, 119 Fed. (2d) 472, it appears that the action is *one at law*, created by statute, to recover taxes claimed to have been overpaid. The case does not involve a motion to dismiss by reason of the statute of limitations. The plaintiff's case was dismissed by final judgment after a trial wherein the statute of limitations was not invoked by a motion or a pleading but was invoked by the court because the question of the time limit was a part of the plaintiff's action and not only barred the *remedy* but also *destroyed the liability* of the appellees to refund the taxes.

Wright v. Bankers Service Corp., 39 Fed. Sup. 980, is also a common law action to recover damages for

fraud under the "Securities Act" of 1933 and amendments thereto designated in the United States Code as Sections 77k and 770, wherein the "time limit" destroyed the liability sought to be enforced. To institute an action within the time especially limited by the act is a condition upon which the right of action depends and must be alleged and proved.

The case of *Cramer v. Aluminum Cooking Utensil*, 1 F. R. D. 741, is an *action at law* to recover damages for the death of a person and has nothing to do with an equitable proceeding involving the rule of diligence or the doctrine of laches. In this case the defendant affirmatively interposed the statute of limitations as a defense and sought to require a reply thereto by the plaintiff. The court merely held that the defendant's motion for an order requiring the plaintiff to reply be denied. We see no similarity with nor applicability to the case at bar in this decision.

In the case of *Barnhart v. Western Maryland Ry. Co.*, 5 Fed. Rule Service, 103, the action was treated as a *common law suit* for wages and damages for a wrongful discharge and the complaint disclosed upon its face that the cause of action arose more than 19 years prior to the institution of the action and nothing was alleged to excuse the long delay. Even in this case the District Court held that ordinarily the defense of limitations must be interposed by an answer except where the bar of limitations *conclusively appears from the complaint*.

The decision in *Pierson v. O'Connor*, 5 Fed. Rule Service, 104, contains no statement with respect to the nature of the action nor the contents of the complaint and is of little value upon the question involved.

A careful comparison of the decisions to which we refer with the cases cited by appellees, concerning the non-availability or the availability of the statute of limitations upon a motion to dismiss, discloses a weight of authority in favor of appellant's contention and, even without respect to the weight of the decisions, it becomes clear, upon a reading of the cases, that our original statement to the effect that "except in very *rare cases* where neglect or lack of diligence is *clearly* apparent upon the face of a complaint, such issue (laches) is factual" is correct. In the present action it can never be precisely and justly determined until the grossness of the appellees' fraud, the extent and nature of their concealment, all the circumstances with respect to the lack of knowledge, the unavailability of means of knowledge and all the circumstances of her discovery of "suspicious circumstances" leading to the actual discovery of the facts set forth in her pleading are considered from the evidence as a whole under a proper and formal issue upon which findings of fact and conclusions of law may be made and entered by the trial court.

At this point it seems appropriate to again refer to the case of *Bachus-Brooks Co. v. Northern Pac. Ry. Co.*, 21 Fed. (2d) 4. As heretofore stated this is a stockholder's suit prosecuted by a minority stockholder in behalf of the corporation, predicated upon the proposition that the Northern Pac. Ry. Co. elects and dominates a *majority* of the Board of Directors of the defendant corporation in which the plaintiff is a stockholder, called the Minnesota Company and that in the transactions of which complaint is made such *majority* of the Board of Directors failed to faithfully serve the interests of the Minnesota

Company and its stockholders, but, on the other hand managed and operated such company for the benefit of the Northern Pac. Ry. Co. This is the identical situation in the case at bar which definitely appears, from the admitted allegations of the appellant's "pleading," except instead of operating the plaintiff's corporation for the benefit of some other corporation, the appellees' general wrong consists in *directly maintaining and operating it for their own individual and private gain.*

In the case here discussed it was expressly contended that the statute of limitations of the State of Minnesota constituted a bar to plaintiff's recovery, asserting that the suit was within the concurrent and not the exclusive equity jurisdiction and that in such cases the Federal courts are bound by the State statutes of limitation which govern actions at law.

The court, after holding that a derivative shareholder's action is within the exclusive jurisdiction of equity, determines that the state statute of limitations is not applicable to such a case in the following language (Op. p. 12):

"No doubt the right of a stockholder to maintain a suit in equity in behalf of the corporation after the running of the statute of limitations should be limited to extraordinary cases *where there are unusually strong equities in favor of the complainant. We think it not difficult, however, to conceive of such a case.* Suppose the same persons constituted the officers and directors of two corporations, that they were unfaithful to their trust in respect to one of the corporations and carried out a transaction to the detriment of such corporation, and for the benefit of the other corporation, *and that they concealed such trans-*

action from the stockholders of the injured corporation until after the running of the statute of limitations; could it be said that a stockholder of such injured corporation on discovery of the facts could not obtain relief from such a transaction in a court of equity? We think not. For these reasons, we believe that the principles of the 'doctrine of laches,' and not the provisions of the statute of limitations, should condition the time within which a stockholder must commence such a suit in behalf of the corporation.

“Is the complaint barred by the doctrine of laches from complaining of wrongs which occurred more than six years prior to the filing of the bill?

“The general principles which control the application of the ‘doctrine of laches’ were stated by Judge Sanborn in *Kelley v. Boettcher* (C. C. A. 8) 85 F. 55, 62, as follows:

“‘In the application of the doctrine of laches, the settled rule is that courts of equity are not bound but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. (Citing cases.) The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after the time fixed by the analogous statute of limitations at law; *but if unusual conditons or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintainance after a longer, period than that fixed by the statute, BUT WILL DETERMINE THE EXTRAORDINARY CASE IN ACCORDANCE WITH THE EQUITIES WHICH CONDITON IT.* * * *”

This indeed is a refreshing decision and constitutes a complete answer to the entire argument presented by the

appellees in Part III of their Brief (pp. 58 to 92, incl.). The case definitely and unequivocally determines that in a case of this nature the California statute of limitations *is not applicable and that there can be no determination of the question of "laches" upon the motions to dismiss because the equities have to be balanced upon a trial of the issue in order to determine whether or not it is inequitable to allow the prosecution of the action after a briefer, or to forbid its maintenance after a longer, period than fixed by the statute.*

In the reported case here discussed it definitely appears that the defense of "laches" *was tried upon its merits* and was sustained because the evidence disclosed without contradiction that the plaintiff stockholder had complete knowledge of all the matters complained of *since their inception* which was more than twelve years prior to the institution of the suit. In the present action, considered from the face of the pleading, there is not the slightest showing that the plaintiff had any knowledge nor the means of knowledge with respect to the misuse of the corporate structure and its funds and property until the 27th day of April, 1939, *when means of knowledge were accidentally discovered* from the quasi judicial proceedings before the Securities Exchange Commission in *Washington, D. C.*, which discovery was followed by investigations which led to the filing of this action on April 16, 1941, only two years and eleven days after "means of knowledge" was uncovered. Appellees cannot and have not presented any argument which can alter this situation. The appellants pleading affirmatively shows that all of the wrongful acts of the appellees were buried, completely and successfully concealed and all means of knowledge

likewise fully covered. These are admitted facts which, even upon a motion to dismiss, cannot be avoided in considering the question of laches.

At pages 62 to 69, inclusive, appellees again attempt to apply the California three year statute of limitations by arbitrarily dividing plaintiff's claim into five separate transactions. We see no point in using space in reply to this character of argument. Our opening brief and the previous remarks in this brief disclose that appellant's claim is founded upon *a single claim or cause of action* and is not to be separated into items for the purpose of attempting to apply the statute of limitations which may be invoked only in common law actions.

At pages 69 to 85, inclusive, of their brief, appellees present the argument that appellant's pleading does not allege sufficient facts to excuse the failure to commence the same within the statutory period of three years. This, of course, assumes a false premise and an argument limited solely to the statute of limitations as distinguished from the "doctrine of laches." The argument made and the cases cited when viewed in the true light of appellant's "pleading" are all irrelevant. They have no bearing upon the conditions and circumstances with respect to the relationship of the parties, the nature of the action, the concealment of the wrongs and the manner of discovery, all of which make it inequitable to deny relief upon the ground of "laches." We make this statement from the face of the pleading in view of the fact that nowhere in appellees' brief have they made answer to the legal effect of "concealment" in cases of this character. Appellees dwell upon the theory of "legal discovery" as based upon the interpretation of the California Statute of Lim-

itations given by its courts *but they do not refer to concealment which from early English law has always kept cases alive which deal with fraud.*

Counsel for appellees in their attempt to apply the California three year statute of limitations to the item which they denominate "the salary agreement transaction" again by argument attempt to divide the same into the separate payments made thereunder and treat the same as mere evidence of damage arising from a single fraudulent act, which, for the purpose of an action at law could have been prospectively estimated. Appellees state (Br. p. 64)

"in this case the statute of limitations began to run either at the time of the perpetration of the alleged fraud or at the time of the discovery".

In support of this statement the following cases are cited:

Thayer v. Kansas Loan Co., 100 Fed. 901;

Agee v. Virden Packing Co., 15 Cal. App. (2d) 691;

Greenberg v. Du Bain Realty Corp., 27 Cal. App. (2d) 111;

Sanders v. Sanders, 117 Cal. App. 231;

Bradbury v. Higgenson, 167 Cal. 553.

While we sincerely believe and firmly assert that a discussion of the California statute of limitations is irrelevant yet as appellant's claim is clearly not barred by such statute, but was instituted less than three years from actual or legal discovery of the fraud we deem it proper to reply to appellees discussion.

The case of *Thayer v. Kansas Loan Co.*, 100 Fed. 901, cited by appellees at pages 64 and 65 of their brief is an

action at law to recover money alleged to have been obtained from the plaintiff by the fraud and deceit of the defendants. Under the "Conformity Act" the question of "time" in which to institute the action was governed by the Kansas statute of limitations which with respect to actions for relief on the ground of fraud provides "the cause of action in such case shall not be deemed to have accrued until discovery of the fraud". The act is similar to the California statute with the exception of the period of time.

In that case it was claimed by the plaintiff that the statute of limitations did not begin to run until after certain foreclosure proceedings had been concluded and a sale of the premises made and the damages determined. The court, under the applicable Kansas statute correctly held that the cause of action accrued upon *discovery* of the fraud which with diligence the plaintiff could have discovered within the two year period.

The court in its opinion makes it clear that the decision is not applicable to the case at bar wherein, in addition to the matter mentioned by appellees, the court states as follows (Op. p. 903):

"Under this statute the cause of action is not deemed to have accrued until the discovery of the fraud, but it is not sufficient to allege or to show merely that the defendant had no notice of the fraud, in order to defeat the plea of the statute of limitations. *It must be also alleged and proved that there has been such concealment as would prevent a person exercising due diligence from discovering the facts.*
* * * The transaction between the plaintiff and the defendants took place in 1886. There is nothing

shown in the petition why the plaintiff could not have discovered the true value of the mortgaged property, and the financial condition of the mortgagors, within two years thereafter, and certainly such discovery could have been made more than two years before the institution of this suit. There is no allegation or proof to show that he made any effort to ascertain these facts. Plaintiff merely relied upon the statements made to him by the agents of the defendant trust corporation."

It will be observed that in the foregoing case there was no concealment of the alleged fraud and the means of knowledge were open to the plaintiff at all times. It was merely a case of lack of diligence which equity requires as a touch-stone for its jurisdiction.

We are at a loss to understand wherein this decision is of any aid to the appellees. We make no contention, even assuming the applicability of the California statute of limitations, that any cause of action ever accrued on behalf of appellant until the means of knowledge was accidentally uncovered and came to her attention on the 27th day of April, 1939.

The case of *Agee v. Virden Packing Co.*, 15 Cal. App. (2d) 691, 694, cited at page 65 of appellees' brief is an action to recover money for fraud which was paid during a period of time ranging from nine to thirteen years prior to seeking relief. *The case involves no concealment and means of knowledge was open to the plaintiffs.* The complaint did not comply with the State rule of decision with respect to showing the circumstances under which the facts constituting the fraud were brought to their knowledge. We have no quarrel with this decision but fail to

see its applicability to a case of concealed fraud which could not be discovered with reasonable diligence as in the case at bar.

The case of *Sanders v. Sanders*, 117 Cal. App. 231, 234, cited by appellees at page 66 of their brief is an action to recover money due under a property settlement agreement but paid under a mistake when it was not due. *The EVIDENCE showed that the party in interest who was the defendant in the action discovered the mistake five years prior to the commencement of the action.* We are wholly unable to understand the applicability of this decision to the present action. We again state that it is our theory of the case that if the California statute of limitations does govern the case at bar instead of the "doctrine of laches" then appellant's action did not accrue until the "discovery" of the fraud which was within the statutory three year period and constitutes diligence. *Upon this subject it must be remembered that appellees' argument, based upon the interpretation of the California statute of limitations in question by it's courts, to the effect that "means of knowledge" constitutes a legal discovery of fraud as distinguished from an actual discovery is not the legal test in determining the question of "laches" as, in such case, there are many other elements to be factually determined in balancing equities as pointed out in our opening brief and herein restated.*

Referring to the case of *Bradbury v. Higgenson*, 167 Cal. 553, cited by appellees at page 66 of their brief, it will be noted that under the California State practice the statute of limitations applies alike to both actions at law and suits in equity and to that extent is distinguished from the Federal practice. This case is an action brought by a

lessor to recover rent due under a lease which the lessee had abandoned on account of an omission therein of a covenant to furnish water. *The means of knowledge were at all times open to the defendant, the mistake was not concealed, the defendant did not seek to present any equity such as exists in cases of fraudulent concealment.* Just what the decision has to do with a shareholders' "derivative suit" for an accounting with respect to secret profits, gains and corporate losses sustained through the operation of the corporation by delinquent directors and which are likewise concealed, we do not know. It is not pointed out in appellees' brief.

At page 69 of appellees' brief the point is made that according to the case of *Wood v. Carpenter*, 101 U. S. 134, 140, 141, a plaintiff must allege with particularity when the fraud was discovered, what it was, how it was made and why it was not made sooner. We submit that appellant's pleading definitely and certainly answers all these requirements. The discovery of "circumstances" leading to the subsequent discovery of the actual fraud is alleged to have occurred on April 27, 1939. The nature of the discovery is alleged to have been a part of certain *quasi* judicial proceedings before the United States Securities Exchange Commission pending in Washington, D. C. and the reason it was not made sooner is found in the admitted allegations of "concealment."

We also direct attention to the fact that the case of *Wood v. Carpenter* relied upon by appellees is *one at law* to recover upon promissory notes and bills of exchange. The Indiana Statute of Limitations with respect to relief against frauds was directly applicable and the strict rule of pleading, to escape the effect of the statute, is confined

to law actions. Even so, the plaintiff's reply to the plea of the Indiana statute was only held insufficient because the manner of concealment was not set forth but was merely alleged as a *general conclusion* to the effect that certain facts were concealed by means of fraud, perjury and certain devices with respect to which the plaintiff had no knowledge of facts so concealed. Bearing in mind that the statute of limitations of Indiana was there directly applicable and the conclusions of the pleader held insufficient, give no weight to the decision as applicable to the complete allegations of fact contained in the appellant's pleading regarding the manner, nature and extent of appellees' concealment. The guilty party will not advertise his own fraud. The frauds consist of matters which must be reflected by book of accounts, figures and designation of dealings. It is admittedly alleged that such records were by specific methods buried and covered beyond discovery by any person not acquainted therewith. The California cases cited by appellees at pages 70, 71, 77, and 78 of their brief add nothing to the potency of their argument upon the point in question.

At pages 78 and 79 of appellees' brief the point is made that to avoid the bar of the statute of limitations (assuming it to be applicable) it became necessary to show by appellant's pleading that the corporation involved was under a disability which prevented the statute from running and that the allegations of the pleading are insufficient for that purpose. In support of the argument there presented the following authorities are cited:

Whitten v. Dabney, 171 Cal. 621-629;

Baillie v. Columbia Gold Mining Co., 86 Ore.;

Starke v. Boggs, 289 Ill. App. 461.;

Texas Company of Mexico v. Ross, 43 Fed. (2)

In the first above mentioned case of *Whitten v. Dabney* the plaintiffs "as stockholders of the Dabney Oil Company sued defendants Dabney, Miley, and Butler, alleged certain factual impositions practiced by them upon the Dabney Oil Company resulting in great loss to that company. They asked for an *accounting* in behalf of the company against these defendants and a recovery into the treasury of the company of the amount which it might be determined that the company had been defrauded. *A conspiracy to commit these fraudulent acts was charged against the three men.* Their control of the corporation through its board of directors and the refusal of the corporation upon demand to prosecute the action is also set forth. Frederick E. Mason, another stockholder, petitioned for leave to intervene and permission was granted. His complaint in intervention set up the same wrongs pleaded by plaintiffs and joined with them in their prayer for relief.

A general demurrer was interposed to these complaints and sustained. So, also, was a demurrer raising the bar of the statute of limitations. From the judgment which followed, plaintiffs appeal in San Francisco, No. 6486. From that same judgment the intervener appeals in San Francisco, No. 6591. Both of these appeals present the same asserted error of the court in sustaining the general demurrer for absence of facts. Both, too, present a like question upon the bar of the statute of limitations."

From a reading of this decision it appears, as in the case at bar, that the complaint charges conspiracy, seeks an accounting from the defendants who in pursuance of a conspiracy between themselves and by means of a *control* of the corporation by a dummy directorate caused false dividends to be declared and paid out of the proceeds of the sale of the corporate stock, false credits to be entered

on the company's books whereby defendants individual indebtedness to the corporation were made to appear as having been paid and cancelled and for commissions upon the sale of treasury stock without authority from the corporation.

The various wrongs and injuries and the several items are included in one cause of action.

The court's summary of the complaint is found at pages 625, 626 and 627 of the opinion, and appears to be substantially similar to the pleading now before the court.

After summarizing the complaint the court in reversing the judgment of the trial court states. [Opinion pp. 627-29-30; App. p. 1.]

We are unable to perceive wherein appellees obtain any satisfaction or comfort from this decision. It expressly holds that the disability of the corporation occurs when its' *control* is in the hands of a board of directors accused of participation in the frauds. It does not hold that by reason of one minority so called innocent director the corporation becomes competent and is relieved from disability. The decision is in accord and supports the reply to appellees' argument No. II, to the effect that the pleading here involved states but one claim or cause of action.

Permit us to suggest that the complaint in the reported case was subject to the strict state rules of pleading with respect to "ultimate facts" while the pleading in the case at bar is governed by the Federal rules of procedure requiring only a short and plain statement of the claim to be construed as to do substantial justice.

In view of these material distinctions in the rule of pleading and by comparison of the pleading in the present action with the complaint in the reported case it becomes

clear that the pleading here discussed should be held sufficient.

The case of *Baille v. Colombia Gold Mining Co.*, 86 Ore. 1, cited by appellees at page 79 of their brief is clearly not in point. In that case the suit was not brought in the right of the corporation but assuming that it stated such a cause yet there was no demand upon the board of directors of the corporation nor are they charged as being the guilty party. The plaintiff attempted to excuse his failure to make a demand upon the board of directors to institute the action by merely alleging that a certain stockholder had it in its power to control the election of officers and the conduct of the business of the corporation and that such stockholder was unwilling to and will not act in the matter.

This is not the case at bar and is in no manner comparable with the pleading in the present action.

On the other hand this decision directly supports the appellant in the present case with respect to her pleading stating but one count or cause of action.

The bill of the minority stockholder in the reported case which alleged a series of frauds committed by the defendants through the control of the corporation was held to state but one cause of action and in this respect the court cited the case of *Baillie v. Backus*, 230 Fed. 711, 716 and in determining that question said. [Opinion p. 15; App. p. 3.]

Referring again to our reply herein to appellees argument No. II, permit us to here show that the decision cited by the Oregon court, namely *Baillie v. Backus*, also is in accord and supports our contention discussed in that part of our argument to the effect that the various items of wrongdoing are not separate claims nor causes of action

but are merely items forming elements for a general accounting. In the *Baillie* case the court had a similar complaint under consideration with respect to which the following statement is made: [Opinion p. 716.]

“Now, the bill of complaint in the present case does not seek a separate accounting, but an accounting by all the parties alleged to have been engaged causing the misappropriation, and, as appears from the theory of the bill, the cause is one against all the parties involved in misappropriating the funds of the Mining Company. Such is the case brought by the plaintiff, and by it he is entitled to have the suit proceed in the forum of his choice. Separate causes of action are not joined, but only a particularization of different items of misappropriation, all entering into and forming elements of the general accounting demanded.”

We have carefully examined the case of *Texas Co. of Mexico v. Ross*, 43 Fed. (2d) 1, 15 and find nothing therein which in any manner relates to the sufficiency of appellant's pleading in the respect adversely criticized by appellees at page 79 of their brief. The decision merely points out that a parent corporation which controls a subsidiary corporation is not liable for a wrong or injury committed by the subsidiary corporation unless it had something actively to do therewith. This seems to be good law but it's applicability to the present case is entirely lacking.

At page 81 of Appellee's Brief it is claimed that if one director of a corporation, who is not under the dominion or control of the other delinquent directors, obtains knowledge of the transaction complained of the statute of limitations begins to run against the corpora-

tion. In support of this contention appellees cite the following cases:

Curtis v. Connly (1921), 257 U. S. 260, 66 L. Ed. 222;

Farmer v. Standeven (1938), 93 F. (2d) 959;

Hughes v. Reed (1931), 46 F. (2d) 435;

Grussemeyer v. Harper (1936), 187 Wash, 508, 60 P. (2d) 702;

Van Schaick v. Aron (1938), 10 N. Y. S. (2d) 550, 562.

The case of *Curtis v. Connly*, 257 U. S. 260, is not a shareholders derivative suit. It is a common law action by a receiver of a National Bank to recover, from former directors, losses sustained by reason of dividends paid out of capital and improper loans and investments made by the defendants. The statute of limitations of the State of Rhode Island was directly applicable to the action.

It is important to note that in this case there was *no fraudulent or other concealment* of the acts of the defendants and because three new directors were elected within the period of the statute of limitations *who were not in conspiracy with the defendants* notice of the wrongful acts was imputed to the corporation as such acts appeared from entries upon the corporate books and records and were not concealed.

The reported case is obviously inapplicable to the case at bar where each and all of the directors during the entire period of time are charged with the wrongs and their acts are alleged to have been concealed by certain and definite averments.

The case of *Farmer v. Standeven*, 93 F. (2d) 959, cited by appellees at page 81 of their Brief is also a case where the wrongful acts of the directors were not concealed and there were directors who were not charged with conspiring with the wrongdoers by reason of which notice of the wrongful acts was imputed to the corporation within the statutory period. The holding of the court that Opinion, pages 961-962, makes this distinction as follows:

"There was neither allegation nor proof of any conspiracy between Standeven and the other directors. There was neither pleading nor proof of active concealment on the part of Standeven. On the contrary, the entire transaction was fairly and fully reflected on the books of the company. The other officers and directors were chargeable with notice of what the books of the company reflected and what reasonably prudent inquiry would have disclosed. The transactions were unusual and the books and records of the company reflected sufficient to put the other officers and directors on inquiry. They could have readily ascertained the market value of the stock on December 31, 1930."

The case of *Hughes v. Reed*, 46 F. (2d) 435, is also an action by a receiver of a National Bank against former directors to recover losses through loans made to officers of the bank which impaired its capital and surplus. After a general discussion with respect to the statute of limitations and the doctrine of laches the court, in holding that the character of the action permitted the application of the Oklahoma three years statute of limitations, determined that the action was barred because it commenced to run when the bank actually parted with the money loaned.

The court obviously based its decision upon *Cooper v. Hill*, 94 Fed. 582 and *Curtis v. Connly*, 257 U. S. 260 [see Opinion, p. 441] wherein in each case, as distinguished from the case at bar, the books of the corporation disclosed the transactions and there were no affirmative acts of concealment nor any charge of a conspiracy between new or any directors, having knowledge of the wrongs, with the defendants nor was there a charge of a conspiracy of silence.

The case of *Gurssemeyer v. Harper*, 187 Wash. 508, cited by appellees upon the point here discussed, does not appear to involve the proposition-urged. It is a case where after the trial it was determined by the court that the plaintiffs had no cause of action against any of the defendants except for negligence of one or two thereof which presented an action at law only and was bared by the Washington two year statute of limitations. The charge of conspiracy was not sustained.

If this case is of any value to a decision in the present action it shows that in involved cases of the character of appellant's action, even the question of the statute of limitations should be tried upon its merits and determined from the evidence disclosing the entire transaction.

The case of *Van Schaick v. Aron*, 10 N. Y. S. (2d) 550, 561, 562, cited by appellees, appears more likely to support the sufficiency of appellant's pleading rather than the point urged by appellees. [Opinion pp. 561, 562; App. p. 3.]

It is indeed a desperate argument for appellees to urge, as an abstract proposition of law, that the knowledge of a so-called innocent director regarding the wrongdoing of other directors who control the corporation is *ipso facto*

imputed to the corporation for the purpose of applying the doctrine of laches or the statute of limitations. By failing to take action on behalf of the corporation with the knowledge so possessed such director is guilty of non-performance of an official obligation amounting to a gross disregard of duty and a breach of trust which in turn constitutes an act beyond the scope of his duty to the corporation and which is not imputed to it.

This principle is stated in *Dodge v. Woolsey*, 59 U. S. 331, 345. [App. p. 6.]

In the present action the pleading charges all the appellees, at all times, with the continued perpetration of all the wrongful acts and it is merely because of a hypothetical and alternative plea, now definitely authorized by the rules, that appellees present this point in the face of the admitted allegations of the pleading.

The mere *possibility* of some director ascertaining the acts of wrongdoing by other directors and failing to seek relief, being hypothetical and permitted as a matter of pleading, bears no relationship to laches or the statute of limitations.

Again referring to the case of *Van Schaick v. Aron*, 10 N. Y. S. (2d) 550, 561, 562, the court at page 561 refers to the following cases:

Smith v. Lyle, 59 S. D. 534;

Adams v. Clark, 22 Fed. (2d) 957;

Reid v. Robinson, 64 Cal. App. 46.

In the first mentioned case of *Smith v. Lyle*, 59 S. D. 534, the defense of the statute of limitations was tried upon the merits and not upon the face of the pleading. This case involves a claim that the statute ran against the

bank's creditors by reason of certain knowledge, of the wrongful acts in question, discovered by the Superintendent of Banks, prior to his taking possession of the bank's assets. It does not seem to apply to any point in the case at bar.

The case of *Adams v. Clark*, 22 Fed. (2d) 957, is a suit by a receiver against directors of a national bank for making illegal loans. It is not based upon the common law negligence of the defendants but upon a *statutory limitation* placed upon the extent of loans which, if violated, made the directors personally liable to the bank or to the stockholders or any other person who suffered as a consequence. The case is similar to the case at bar in that the corporation was at all times under the *exclusive control of the defendants*. The decision does not involve any proposition relating to knowledge of an innocent director being imputed to the banking corporation.

The case of *Reid v. Robinson*, 64 Cal. App. 46, mentioned in the reported case, is worthy of consideration. It involves a case where one of the stockholder plaintiffs was also a director of the corporation during the time that the frauds were perpetrated by the defendants, his co-directors. The case not only supports the appellant's pleading but shows that a trial is essential upon the defense of laches and the defense of the statute of limitations in order that a just decision may be reached and that the question of knowledge or means of knowledge of a director is factual. [Opinion pp. 55, 56; App. p. 4.]

The case here considered also supports appellant's contention that a shareholder's derivative suit to recover secret profits made through fraud of the directors is properly one of *accounting*, that there is no duty incumbent

upon the plaintiff shareholders to examine the books or the minutes of the corporation for the purpose of detecting fraudulent acts and that a defendant who is in any manner concerned in the wrong irrespective of the degree in which he participates and without reference to any benefit which he may receive therefrom is liable therefor. [Opinion p. 48; App. p. 4.]

Replying to Appellees' Argument No. IV.

(Brief pp. 93 to 112.)

This part of appellees' brief is an attempt to develop by mere argument and unwarranted assumption that the real relationship between the Transamerica Corporation and its subsidiary departments and instrumentalities is something different from that alleged in appellant's pleading. In this argument appellees also make some comment concerning the authorities cited in our opening brief upon this subject, but nowhere is the principle for which we contend weakened in its application to the pleading here involved.

After a careful consideration of appellee's argument in the respect noted, and the decisions cited, we feel safe in saying that appellees intend thereby to admit the doctrine of the "disregard of the separate entity" of a controlled corporation where recognition thereof results in an injustice but base their point upon the claim that (Brief p. 107):

"No reasons of justice or equity have been advanced by appellant herein as to why the court should pierce the corporate veil of Transamerica's subsidiaries."

A complete answer to this line of reasoning is that these so-called subsidiaries are not, as yet, found to be independent corporate structures but on the other hand are alleged to be mere departments and instrumentalities of the Transamerica Corporation. The injustice of recognizing these departments as separate entities appears from the face of the entire transaction set forth in the pleading. The alleged corporate veil of Transamerica's subsidiaries is already pierced by the pleading, and appellant will be called upon to establish the allegations thereof.

We have read the case of *Greenburg v. Gianinni*, 140 Fed. (2d) 550, which appellees cite (Brief pp. 107, 108), and find no fault therewith. It does not relate to a double derivative suit but on the other hand it does show that a shareholder's action is properly one for an "accounting."

In further reply to appellees' argument (Brief p. 107) permit us to respectfully state that we are not seeking an accounting for any sums of money or to replace any losses except *those of the Transamerica Corporation*. Where the Transamerica Corporation, as the real party in interest, is wronged it necessarily follows that its departments and agencies are harmed but this does not mean an "independent" harm, it is merely the manner of stating that the entire organization has suffered.

The decision in *Philipbar v. Derby*, 85 Fed. (2d) 27, mentioned by appellees (Brief pp. 108, 109, 110) does not involve a factual nor a legal situation as here presented except it is a stockholder's derivative suit against directors

for an *accounting* wherein the corporation was quite properly held to be an indispensable party. Appellees have gone far in an attempt to separate and have the "individual entities" of the several departments and agencies of the Transamerica Corporation considered as "parties in interest" in face of the admitted averments of the pleading.

The fact that the pleading alleges that the subsidiary departments and agencies suffered injuries and detriment in no manner changes the legal effect or sufficiency of the pleading as the Transamerica Corporation is also alleged to have *suffered the same injuries and detriment*. The expression noted, upon which appellees comment (Brief p. 111), is undoubtedly unnecessary to appellant's pleading but it is not fatal.

We are standing in this case upon the injury and detriment caused to the Transamerica Corporation by the manipulation of its funds and assets through and by means of its various agencies and departments. A fair interpretation of appellant's pleading so discloses. In support of our presentation of this subject in our opening brief we respectfully refer the court to the following cases:

Nichols & Co. v. Secretary of Agriculture, 131 Fed. (2d) 651, 7th Syl. Op. pp. 655, 656;

In re Otsego Wax Paper Co., 14 Fed. Supp. 15, 2d Syl., Op. p. 16;

In re Kentucky Wagon Mfg. Co., 71 Fed. (2d) 802, 2d Syl., Op. p. 804.

Replying to Appellee's Argument No. V.

(Brief pp. 113 to 129.)

Appellees' argument, in the respect here considered, is that by reason of conclusions of law set forth in appellant's pleading it is too vague, general and indefinite to state a claim.

At the outset it is well to note that in the argument in support of such contention as well as under appellees' points III and IV, reference is made to an argument based upon the appellees' motions for a more definite statement which were not decided by the trial court. This argument is brought forward in their discussion regarding the motions to dismiss because the trial court in its memorandum of conclusions made, as a reason for its decision, a general conclusion which is far more vague and uncertain than appellant's pleading. This general and uncertain conclusion of the court, which we discuss under part I of our opening brief(pp. 45 to 68), appellees attempt to make definite by claiming that certain language in the pleading consists of conclusions of law and all that as so claimed relates to the allegations that the salary agreement and the credit entries which were used to perpetrate the fraud were "pretended, fraud and fictitious and that the credit entries were computed and unrealized profits." The later allegation is obviously one of ultimate fact. The former averment might be considered a conclusion but not when used in conjunction with the context of the entire paragraph wherein it is used. The salary agreement was pretended, fraudulent and fictitious because it was *definitely used for a wrongful purpose*. All of this is clearly charged and even the appellees do not contend that they could not prepare a responsive pleading thereto.

It is also claimed that the pleading is improper because it alleges that the appellees committed the corporate acts "without legal right or authority." Here again it is a debatable and doubtful statement to say that such an allegation as used in the pleading constitutes a conclusion of law or of the pleader. Whether one, under the circumstances averred, had a legal right or authority to perform an act for another must be factual.

A careful reading of appellees' argument discloses that with the exception of the case of *Swan v. Consolidated Water Co.*, 28 Fed. (2d) 971, decided in 1928, long prior to the effective date of the Federal Rules of Civil Procedure, the only decisions mentioned in support of appellees' argument come from California and other states not affected by the reformed practice. It certainly requires no argument to be assured that neither the common law or statutory rule of pleading of the states involved in such decisions bear any relationship to the rules now in effect in the Federal courts. In preparing the pleading in the present action we relied upon these rules and the decisions mentioned in our opening brief.

A considerable portion of appellees' argument is devoted to the Rule (9b), which requires the circumstances constituting fraud to be stated with particularity.

Neither the trial court's conclusion nor appellees' argument in any manner alter the plain and simple allegations of the pleading. Each and every wrongful or fraudulent act is stated with particularity and the only matter lacking

in the pleadings is the evidence showing the means used to perpetrate the wrongs. It is true, as argued by appellees (Brief p. 125), that fraud is never presumed, but, be that as it may, we submit that if the appellees did the things charged in the pleading they were guilty of frauds and civil wrongs. Here again it may be observed that we are not presently trying the case upon the merits nor presenting it upon evidence but on the other hand are submitting our case upon admitted allegations of a pleading permitted by a reformed procedure which should not be ignored in considering its sufficiency. We feel the situation justifies the following question: What material particularity is missing from appellant's pleading which makes it insufficient for a responsive pleading?

Neither the trial court nor opposing counsel have made an answer to this question. The details of that which appellees desire or may need to prepare for trial can readily be obtained by deposition and discovery.

Under this argument appellees, at pages 126, 127, 128 and 129 of their brief, again assume that appellant's action, instead of being one to *declare a trust and for a general accounting* to consist of several claims or causes of action. It seems that in practically all of appellees' several arguments recourse is made to this misapprehension of appellant's action and used as a basis for a discussion which evades the realities of the case. We again urge that appellant's pleading is sufficient within the meaning of the rules and the decisions cited in our opening brief and in further support thereof we refer to the following cases.

Relating to Point VI of Appellees' Brief Wherein an Attempt Is Made to Evade the Trial Court's Consideration of Evidence in Passing Upon Appellees' Motion to Dismiss.

(Appellees' Brief pp. 129-133).

At the outset it must be considered that appellees' motion to dismiss was the only one decided by the trial court. The appellees by correspondence with the Judge of the Court submitted photostatic copies of the minutes of the Board of Directors of the Transamerica Corporation relating to their meeting of December 9, 1931, and also two affidavits were presented one of Hector Campana [R. 271-273], and one of Edmund Nelson, Esq. [R. 269, 270.]

These documents, the effect of which appellees seek to evade by referring to them as material to the grounds of other motions not decided, are in fact material only for one purpose and that is with respect to the possibility of appellant receiving notice in 1931 of wrongdoing on the part of the Gianninis. These documents were *received by the court and filed*. They were not returned to the attorneys who transmitted the same.

It would indeed be destructive of legal philosophy to say that they were not considered by the trial court in passing upon the motions to dismiss in the face of the "conclusion" of the court contained in its Memorandum, namely [Tr. p. 492; Appellant's Br., Point II, pp. 36, 37]:

"If the bar of the Statute of Limitations or of laches is to be avoided it will be necessary for plaintiff to plead other facts besides those set forth in her second amended complaint."

Appellees' argument that these documents are material in behalf of their motions for a separate statement of claims or to support the ground that the second amended complaint is a sham, is so far afield that some other explanation is due the court. It is quite obvious that these documents were considered because they were filed and the point determined adversely to appellant.

The authorities upon this subject set forth in appellant's opening brief are indeed sufficient to require a reversal of the trial court's order and judgment and appellees have made no reply thereto.

The case of *Hewitt v. Great Northern Beet Sugar Co.*, 230 Fed. 394, mentioned at pages 132-133 of appellees' brief, has no relevancy to nor does it answer the discussion contained in our opening brief upon this subject.

Concerning the Bacigalupi letter of December 9, 1931, appellees now make the claim:

"At least as far as these appellees were concerned the letter constituted an effective 'withdrawal' from the alleged conspiracy, even within the strict rule of criminal conspiracies stated in *Eldredge v. U. S.*, 62 Fed. (2d) 449, 459, quoted in appellant's brief, page 105."

The appellant's pleading charges these very appellees with a *continuing* conspiracy and if the letter constitutes a "withdrawal" therefrom on the part of any appellee, then again the trial court considered evidence to unseat plain admitted facts.

Relating to Appellees' Supplemental Brief.

In this brief, the appellee, Bank of America National Trust and Savings Association, as Administrator of the Estate of John M. Grant, deceased, presents the point that appellant's claim is one "arising upon contract" and therefore must be dismissed because, prior thereto, it had not been presented to the administrator as required by Section 707 of the California Probate Code.

It is clear that if the foregoing provision of the California Probate Code is applicable, then the claims contemplated thereby must arise upon contract.

Counsel for this particular appellee, in their effect to sustain such a contention, cite at page 4 of the brief the following cases:

Norse v. Steele, 149 Cal. 303, 86 Pac. 693;

De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718;

Allsop v. Joshua Hendy Machine Works, 5 Cal. App. 228, 90 Pac. 39;

Garcelon v. Commercial Travelers Ass'n, 184 Mass. 8, 67 N. E. 868.

The case of *Morse v. Steele*, 149 Cal. 303, is one where the defendant received from the plaintiff certain animals under an *express contract* that he would take care of them and on certain conditions return them to the plaintiff. He breached his contract and was therefore sued. We see no comparable likeness between this statement of facts and the situation presented in appellant's pleading in the present action.

In *De Leonis v. Etchepare*, 120 Cal. 407, there was indeed an *implied contract* to account for the money belonging to the principal which the agent received.

In *Allsop v. Joshua Hendy Machine Works*, 5 Cal. App. 228, the action was fundamentally one upon an *implied contract*. One can always waive a tort upon such conditions and sue upon an implied contract.

In the case of *Garcelon v. Commercial Travelers Ass'n.*, 184 Mass. 8, the action was based upon a *contract* between the plaintiff and defendant irrespective of the alleged bad faith and fraudulent purpose of the defendant in refusing to comply therewith.

We do not feel called upon to make a detailed argument upon this point and in lieu thereof we respectfully refer the court to the following decisions:

Smith v. Smith, (9th Cir.)-224 Fed. 1, 3rd Syl.,
Op. p. 4;

Johnston v. McCluney, 80 S. W. (2d) 898, 8th
Syl., Op. p. 93;

Leverone v. Weakly, 155 Cal. 395, 10th Syl., Op.
p. 401;

Hardin v. Sin Claire, 115 Cal. 460, 2nd Syl., Op.
pp. 463, 464;

Thompson v. Byers, 116 Cal. App. 214, 4th Syl.,
Op. p. 218.

Conclusion.

We have, by this brief, made an attempt to be useful to the Court and the matter stated is our sincere expression of the nature of appellant's case as interpreted by the laws and the rules of procedure applicable thereto.

As counsel for appellees have placed emphasis and reliance upon the contention that the "pleading" contains several claims, we again, at the risk of repetition, direct attention to the fact that the case is one to *establish a trust and compel the trustees to account*. It is but a single claim.

We also stand upon the proposition that the application of the "doctrine of laches" is factual and that *each case is a law unto itself* and, in that respect, we submit that there is nothing contained in appellant's pleading which directly or indirectly shows a lack of diligence on her part.

A pleading such as the one here involved is difficult to prepare from the viewpoint of one from whom material facts have been concealed but it is easy to criticize any pleading and we make no claim of perfection. However, we do submit that the "pleading" is sufficiently plain for a responsive pleading and that whatever so-called conclusions of law or of the pleader may be contained therein are not fatal to appellant's action.

Practically all of the matters urged by the appellees are points more properly directed to "discovery or pre-trial procedure."

For the reasons herein stated and those contained in our opening brief, we respectfully request that the order and judgment of the trial court be reversed and that we have our costs herein.

Respectfully submitted,

VINCENT A. MARCO,

PERCY V. CLIBBORN,

HOMER N. BOARDMAN,

Attorneys for Appellant.

APPENDIX.

(Excerpts from *Whitten v. Dabney*, 171 Cal. 621, Opinion p. 627):

“This sufficiency indicates the gravamen of the charges of wrongdoing as they affect the corporation, and it certainly needs no discussion to establish that they charge sufficient facts to demand an investigation and inquiry by the court of equity to which the appeal has been made. So true and so apparent do we think this is, that we conclude that the court sustained the demurrer upon the ground that the statute of limitations was well pleaded, and to this proposition we next come.”

(Opinion pp. 629, 630):

“Respondents argue that from this pleading it is shown that the stockholder’s alarms were excited; that they instituted inquiry and were thus put upon notice in 1906, and that this action not having been commenced until 1910, they have waited too long and relief must be denied. This contention demands again a brief consideration of this peculiar character of action. A stockholder who institutes it sues purely as a trustee to redress corporate injuries. *He has the unquestioned right to sue, but it is in no sense his duty to sue.* An individual stockholder may be put upon notice that his corporation has been defrauded. Indeed complete disclosure of these facts may be made to him. He gives consideration to the time, trouble, and expense of the litigation and the loss in which he would be involved if he failed to prevail, and decides that he will not begin the suit. Some years afterward another stockholder for the *first time* gains knowledge of these same facts and

institutes the action. It is susceptible of demonstration that the first stockholder knew of all these matters and that as to him this right of action may be barred. Is this also a bar to the prosecution of the same action by another stockholder who has acted promptly upon learning of the fraud. *Clearly this cannot be so.* So long as the corporation itself remains under disability and powerless to act by virtue of the fact *that its CONTROL is in the hands of a board of directors accused of participation in the frauds* the statute of limitations does not run against it. It is like the minority of an infant. His rights are not lost until, he after attaining majority, acquiesces for the prescribed time and by acquiescence affirms the acts done against his interests. So that even if it be said (and in saying it we do not decide it) that such a complaint as this shows that the plaintiff stockholder has waited too long before commencing his action, and that therefore the plea of the statute of limitations must be sustained against his action, *this does not operate as a bar to the corporate rights when prosecuted by another stockholder.* Otherwise we would have the anomalous and absurd condition presented of a complacent stockholder waiting for three years, pleading facts showing that his right of action was thus barred, and thus sweeping away every right of the corporation by the judgment which would have to follow. Whatever, therefore, may have been the rights of the Providence stockholders to prosecute this after notice, *the right of these plaintiffs is not barred under the allegation that they first acquired notice and knowledge of the efforts of the Providence stockholders in 1910."*

(Excerpt from *Baillie v. Columbia Gold Mining Co.*, 86 Ore. 1, Opinion p. 15):

“Error is assigned on the order of the Circuit Court overruling the demurrer to the amended complaint. The demurrer charges multifariousness, insufficiency of facts and failure to bring the suit within the time limited by the Oregon Code. We do not think the complaint multifarious. It alleges a series of fraudulent acts committed by the defense by virtue of their control of the defendant Columbia Gold Mining Company, hereinafter called the Columbia Company. The allegations with reference to plaintiff’s right to injunction are properly pleaded in a single count with other allegations. Our conclusions on the branch of the case are in harmony with those of the Federal Court;

Baillie v. Backus, 230 Fed. 711, 716.”

(Excerpt from *Van Schaick v. Aron*, 10 N. Y. Supplement (2d) 550, Opinion pp. 561, 562):

“Whatever the law may have been therefore, it is clear that the knowledge of wrongdoing directors, in the light of the discovery provision, may not be imputable to the corporation so as to commence the running of the limitation period. To so determine would render the discovery provision nugatory, for otherwise, in every case, the statute would of necessity begin to run from the date of the transaction. The decision in other jurisdictions based on substantially similar statutory provisions are to this effect and no decisions to the contrary have been presented to the court.

Smith v. Lyle, 59 S. D. 534, 241 N. W. 512;

Adams v. Clarke, 9 Cir., 22 F. (2d) 957;

Reid v. Robinson, 64 Cal. App. 46, 220 P. 676.

It is untenable to assume that wrongdoing directors would set in motion proceedings to charge themselves with liability because of their illegal acts. In an unreported decision the late Mr. Justice Tierney stated: 'Under this statute, however, it would be unreasonable to hold that acts of misconduct of an officer or director were discovered by the corporation because an officer or director knew of them. In such a case, two offending officers or directors could give one another absolution by keeping silent as to the other's derelictions.'

Phillips v. Bank of New York.

In the instant case the wrongdoing directors were in exclusive control of the affairs of the corporation up to March 9, 1932. The basis of their liability, whether for negligence or for active participation in the wrongful acts, is not significant, the statute is tolled so long as the controlling directors are subject to suit and liability for their acts. Of course the knowledge of the new directors who were elected on March 9, 1932 is imputable to the corporation but that date is less than three years from the date of actual suit. The statute of limitations becomes operative as of that date."

(Excerpts from *Reid v. Robinson*, 64 Cal. App. 46, Opinion pp. 48, 55, 56):

"This action sounds in fraud. It is brought by certain persons who, during a portion of the time involved herein, were stockholders of a corporation. The purpose of the action is to compel certain other persons, who were likewise stockholders and directors of the corporation, to account for alleged secret profits made by one of them in which he was

aided and abetted by the other of them (although not to his profit) in the sale of certain real property belonging to the corporation.

It is earnestly contended that Reid at least, being a director of the land company, had means of knowledge and that the circumstances were such as to place him on inquiry to the end that he must have had notice of the fraud at so early a date in connection with the transaction in question as would start the operation of the statute and bar the action before suit was commenced. It is true that the minutes of the corporation do disclose such acts and inferences as, assuming that Reid actually read them, should have placed him as a prudent man on inquiry. He denied that he ever read the minutes until at a time very shortly before the suit was commenced. There was other evidence, both for and against, as far as notice to Reid was concerned, but very little, if any, to show notice on the part of the other plaintiffs. The evidence was conflicting and the determination of the truth rested finally with the trial court."

(Opinion p. 56):

"There was no duty or obligation incumbent upon either Reid or any of his co-plaintiffs to examine the books or the minutes of the corporation either constantly or at intervals for the purpose of detecting fraudulent acts or transactions either as against the stockholders generally or as against themselves in particular. The case of *Prewitt v. Sunnymead Orchard Co.*, 189 Cal. 723 (209 Pac. 995), contains the declaration of law that 'inasmuch as respondents had no actual knowledge of circumstances which would lead her to examine the books or the matters

which appeared therein, and as there was no duty imposed on her by law to examine them, she cannot be charged with constructive knowledge of the facts which an examination of the books might have led her to discover.' The same principal of law is announced in *Pacific Vinegar Works v. Smith*, 152 Cal. 507 (93 Pac. 85), and the following cases are also in point. *First National Bank v. Drake*, 29 Kan. 311 (44 Am. Rep. 646); *Rudd v. Robinson*, 126 N. Y. 113 (22 Am. St. Rep. 816, 12 L. R. A. 463, 26 N. E. 1046)."

(Excerpts from *Fleishhacker v. Bloom*, 109 Fed. (2d) 543, Opinion p. 548):

"The pleadings did not specifically frame an issue in respect of the bank's notice or knowledge of the fraud. We doubt, therefore, that appellants are in a position to urge the bar of the statute in so far as it relates to the bank itself. Whether the trial court regarded the statute as having been waived by failure properly to plead it, and for that reason made no finding, we are unable to determine. However, since the parties have assumed that the question is properly before us, we will consider and decide it."

(Excerpt from *Dodge v. Woolsey*, 59 U. S. 331, 345):

"Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty, than of an error of judgment. *It was a non-performance of a confessed official obligation, amounting to what the law considers a*

breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true, of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, *their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the bank. A sense of duty and conduct contrary to it, is not 'an error of judgment merely,'* and cannot be so called in any case. *It amounted to an illegal application of the profits due to the stockholders of the bank, into which a court of equity will inquire to prevent its being made."*

(Excerpt from *Stone v. Winn*, 165 Kentucky 9, Opinion pp. 30, 31):

"Aside from the construction of the Enabling Act of 1888, and the proposition submitting the question to a vote, this entire case is based upon the allegation of fraud in the election in which the proposition to make the subscription on behalf of the country was carried. In addition to the plea of *res judicata* the appellants interposed a plea of limitation to this action, based upon Section 2519 of the Kentucky Statute, which provides that in actions for relief for fraud or mistake, the cause of action shall not be deemed to have accrued until after the discovery of the fraud or the mistake, but that no such action shall be brought ten years after the time of making the contract, or the per-

petration of the fraud. As this allegation was held on August 11, 1888, and this action was not brought until June 18, 1913, nearly twenty-five years thereafter, it is clearly barred by limitation.

Moreover in the case filed by Estell County against the Railway Company in the Estell Common Pleas Court in 1891, as above pointed out in this opinion, the ground upon which the county sought to stop the delivery of the bonds was fraud perpetrated in the election of 1888.

Under the statute above quoted the time of the discovery of the fraud can have no bearing upon this case since more than ten years have elapsed since the perpetration of the alleged fraud."

No. 10621

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. M. PEARSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

**Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division**

FILED

AUG 16 1944

**PAUL P. O'BRIEN,
CLERK**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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*Page number appearing at foot of certified transcript of record.

In the District Court of the United States, Southern
District of California, Central Division.

No. 16149

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. M. PEARSON,

Defendant.

INFORMATION.

Comes now Charles H. Carr, United States Attorney in and for the Southern District of Columbia, Central Division, who for the United States and in its behalf, prosecutes in his own proper person, and with leave of Court first had and obtained, gives the Court here to understand and be informed as follows, to-wit: * * * [3]

COUNT SIX.

[N.E.W. ord. ent. 11/18/43] March

That on or about the 31st day of ~~October~~, 1943, in the City of Los Angeles, County of Los Angeles, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, A. M. Pearson did knowingly, wilfully, and unlawfully sell and supply to Lieutenant D. M. Johnson, an individual, service on a certain R. C. A. radio, No. 196679, for the sum of \$6.45; that the sale of said service on the R. C. A. radio at \$6.45 was in excess of the maximum price per-

mitted by Maximum Price Regulation No. 165, as amended, and in violation of Maximum Price Regulation No. 165, as amended (Maximum Price Regulation No. 165, 7 Fed. Reg. 4734; amended, 7 Fed. Reg. 5028, 8 Fed. Reg. 4782, 8 Fed. Reg. 5681; 8 Fed. Reg. 5755, 8 Fed. Reg. 5933, 8 Fed. Reg. 5806) issued by Leon Henderson, as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form and effect of the statute in such case made and provided and against the peace and dignity of the United States of America.

* * * * *

[7]

CHARLES H. CARR,

United States Attorney

By RONALD ABERNETHY,

Assistant United States Attorney.

[Verified]

[Endorsed]: Filed Aug. 11, 1943. [11]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 23rd day of August in the year of our Lord one thousand nine hundred and forty-three.

Present:

The Honorable Ben Harrison, District Judge.

No. 16,149-Crim.

United States of America,

Plaintiff,

vs.

A. M. Pearson,

Defendant.

This cause coming on for arraignment and plea of the defendant A. M. Pearson; Ray H. Kinnison, Esq., Assistant U. S. Attorney, appearing for the Government; Lee J. Myers, Esq., appearing as counsel for the defendant; H. A. Dewing, Court Reporter, being present and reporting the proceedings; the defendant, being present in Court on his own recognizance, now states his true name to be as charged in the Information and enters plea of not guilty to all counts of the Information. It is ordered that this cause be, and it hereby is, continued to September 13, 1943, at 10 a. m. before Judge Beaumont for setting for trial. [12]

In the United States District Court, Southern District
of California, Central Division.

No. 16149-Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. M. PEARSON,

Defendant.

VERDICT.

We, the Jury in the above-entitled cause, find the defendant, A. M. Pearson, not guilty as charged in count one of the Information, not guilty as charged in count four of the Information, not guilty as charged in count five of the Information, guilty as charged in count six of the Information, not guilty as charged in count ten of the Information, and not guilty as charged in count eleven of the Information.

Dated: Los Angeles, California, November 18, 1943.

DELMAR L. TRUE

Foreman.

[Endorsed]: Filed Nov. 18, 1943. [22]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL.

Now comes the defendant, A. M. Pearson, and moves the Court to set aside the verdict of the jury returned in the above entitled action on November 18th, 1943, and to grant a new trial on Count VI of the Information on the following grounds, to wit:

1. The verdict is contrary to law.

2. The evidence was insufficient to justify the verdict in that there was no substantial evidence to show that the Defendant did any work upon the radio of D. M. Johnson, or that he had any personal knowledge as to the amount of work which had been done upon it; that the complainant Johnson testified that the radio was delivered to an employee who made out an order which Johnson signed and which is in evidence; the undisputed evidence of the defendant was that he did no work upon the radio and made up a bill based upon time reports turned into him by the employee, which time was charged at rates listed with the office of Price Administration.

3. Count VI of the Information does not state facts sufficient to constitute the crime charged.

4. Count VI of the Information does not charge a crime under the laws of the United States.

5. The Court erred in refusing to direct a verdict of *acquittal* on Count VI at the conclusion of the Government's case to which refusal the defendant excepted.

6. The Court erred in the instruction given to the jury after the jury had retired to deliberate upon the verdict and returned into Court [23] and requested further instructions, to which the defendant excepted.

7. The Court erred in refusing to give defendant's requested Instruction Number 10.

Dated this 20th day of November, 1943.

LEE J. MYERS

Attorney for Defendant.

POINTS AND AUTHORITIES.

1. The United States District Courts may grant a new trial in all cases.

U. S. Statutes Title 28, Sec. 391.

2. In passing upon a motion for new trial it is the duty of the Judge to weigh the evidence.

Big Brush Coal Co. v. Williams, 176 Fed. 529

Lake Erie & W. R. Co. v. Schneider, 257 Fed. 675

3. New trials are granted where the Court erred in stating the law, or where the verdict of the jury has no evidence to sustain it, or where the great preponderance of the evidence is against the verdict.

Pringle v. Guild, 119 Fed. 962

4. A judgment of conviction cannot be sustained if the indictment fails to state facts sufficient to constitute the crime charged, though there was no demurrer, motion to quash, demand for Bill of Particulars, motion for a new trial or in arrest of judgment; and no specific exception to any instruction and only a general exception to a refusal to instruct.

Somenberg v. U. S., 264 Fed. 327

5. The Government must prove beyond a reasonable doubt that the alleged violation was "wilful," and there must be a "conscious" violation.

U. S. v. Slobodkin, 48 Fed. Supp. 913.

Respectfully submitted,

LEE J. MYERS

Attorney for Defendant. [24]

Received copy of the within this 22d day of November, 1943.

CHARLES H. CARR

Attorney for Plaintiff, HM

[Endorsed]: Filed Nov. 22, 1943. [25]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 22nd day of November in the year of our Lord one thousand nine hundred and forty-three.

Present:

The Honorable Ben Harrison, District Judge.

No. 16,149-Crim.

United States of America,

Plaintiff,

vs.

A. M. Pearson,

Defendant.

This cause coming on for hearing on motion of defendant for new trial, filed November 22, 1943, and for sentence of the defendant A. M. Pearson on count 6 of the Information herein; E. A. Tolin, Esq., Assistant U. S. Attorney, appearing for the Government; Lee J. Myers, Esq., appearing as counsel for the defendant; Myrtle Bennalack, Court Reporter, being present and reporting the proceedings; the defendant being present in Court on his own recognizance.

Attorney Myers states motion for new trial and grounds in support thereof; Attorney Tolin makes a statement on behalf of the Government; the Court orders motion of defendant for new trial denied, makes a statement and pronounces judgment against the defendant as follows:

* * * * * [26]

[Title of District Court and Cause.]

JUDGMENT AND COMMITMENT

Criminal. Information in Eleven counts for violation of Emergency Price Control Act of 1942.

On this 22nd day of November, 1943, came the United States Attorney, and the defendant A. M. Pearson appearing in proper person, and by his attorney, Lee J. Myers, Esq., and

The defendant having been convicted on verdict of guilty of the offense charged in the Information in the above-entitled cause, to wit: count six;-did knowingly, wilfully, and unlawfully sell and supply to a certain individual service on a certain R.C.A. radio, etc., for the sum of \$6.45; that the sale of said service was in excess of the maximum price permitted by the Maximum Price Regulation No. 165, as amended, etc., pursuant to Section 2 of the Emergency Price Control Act of 1942; as more fully set forth in count six of the Information herein; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of six (6) months in a county jail and pay a fine unto the United States of America in the sum of Five (\$500.) hundred dollars; and it is further ordered that said jail term is suspended upon the payment of said fine for the period of two years upon condition that in the future the defendant shall comply with the laws of the United States, State,

County and City in which he resides, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that execution is stayed for the period of five days.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) BEN HARRISON

United States District Judge.

[Endorsed]: Filed Nov. 22, 1943. [27]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Name and Address of Appellant: A. M. Pearson, 5120 West Adams Boulevard, Los Angeles, California.

Name and Address of Appellant's Attorney: Lee J. Myers, 608 South Hill Street, Los Angeles, California.

Offense: Violation of the Maximum Price Regulation No. 165, as amended, and in violation of Maximum Price Regulation No. 165, as amended, (Maximum Price Regulation No. 165, 7 Fed. Reg. 4734; amended, 7 Fed. Reg. 5028, 8 Fed. Reg. 4782, 8 Fed. Reg. 5681, 8 Fed. Reg. 5755, 8 Fed. Reg. 5933, 8 Fed. Reg. 5806.) issued by Leon

Henderson, as administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942, (Emergency Price Control Act of 1942, Pub. L. 421, 77 Cong., 2nd Sess., 56 Stat. 23, January 30, 1942,) contrary to the form and effect of the statute in such case made and provided and against the peace and dignity of the United States of America (count 6 of the information).

Date of Judgment: November 22, 1943.

Description of Judgment and Sentence: \$500.00 fine and 6 months in County Jail and suspended upon condition that fine is paid, and two years probation; 5 day stay of imprisonment.

I, the above named appellant, hereby appeal to the United States Circuit Court of *Appeal* for the Ninth Circuit from the judgment on the grounds hereinafter set forth.

Notice is hereby given, pursuant to Rule V, that I do not elect to pay the fine imposed, nor elect to enter upon the service of the sentence [28] pending appeal, but will, in lieu thereof, deposit, with permission of the Court, with the Clerk of the Court the fine so imposed, conditioned upon the outcome of this appeal.

Dated: November 26, 1943.

A. M. PEARSON

Appellant

LEE J. MYERS

Attorney for Appellant.

GROUNDS OF APPEAL

I.

That count VI of said information fails to state a public offense against the laws of the United States.

II.

That there is no reasonable or probable cause upon which the information was based.

III.

That said verdict and finding of guilt is contrary to the evidence adduced at the trial of said cause.

IV.

That the evidence is insufficient to support the verdict; the verdict is contrary to the law and the evidence.

V.

That the Court should have granted the motion for a directed verdict at the close of the Government's case.

VI.

That the Court erred in rulings made throughout the trial of the case and at the close of the case, and in its order over-ruling the motion for a new trial.

VII.

That the Court erred in admitting into evidence and permitted to be considered by the jury evidence tending to show the commission of offenses other than those set forth in the information upon which the defendant was tried. [29]

VIII.

That the Court erred in instructions given, particularly on the question of violation of law created by executive order.

IX.

That the Court was guilty of gross mis-conduct in reprimanding the jury when it announced its inability to agree upon a verdict and that they were dead-locked; that the order of the Court for the jury to return to their jury-room and as reasonable men to agree, otherwise they would be locked up for the night, was highly prejudicial to the rights of the Defendant.

X.

That the Court erred in its rulings that a violation of the Maximum Price Regulation No. 165, as amended, constituted a violation of Section 2 of the Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23, January 30, 1942.

LEE J. MYERS

Attorney for Appellant.

Received copy of the within Notice of Appeal this 26 day of November, 1943. Attorney for Plaintiff,

CHARLES H. CARR. I.J.

U. S. Attorney.

[Endorsed]: Filed Nov. 26, 1943. [30]

[Title of District Court and Cause.]

ORDER.

Upon motion of the Defendant's attorney, and good cause appearing:

It is hereby ordered that the Defendant, A. M. Pearson, be released on his own recognizance pending the decision upon appeal in the above entitled action, upon depositing the sum of Five Hundred (500) Dollars, in cash, in the Registry of the United States District Court,

Southern District of California, Central Division, and upon filing a supersedeas bond in connection with said cash deposit.

Done this 27th day of November, 1943.

BEN HARRISON

Judge of the United States District Court.

Approved as to Form:

CHARLES H. CARR

U. S. Atty

By James M. Carter

Asst U. S. Atty

Received copy of the within Order this 27th day of November, 1943.

CHARLES H. CARR, I.J.

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 27, 1943. [31]

[Title of District Court and Cause.]

SUPERSEDEAS BOND.

Know All Men by These Presents:

That I, A. M. Pearson, of the City of Los Angeles, State of California, as principal am held firmly bound unto the United States of America in the sum of Five Hundred (500) Dollars for the payment of which said sum I bind myself, my heirs, executors, administrators and assigns. The condition of the foregoing obligation is as follows:

Whereas, heretofore, to wit, on the 22nd day of November, 1943, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said

Court in which the United States of America was Plaintiff and A. M. Pearson was Defendant, a Judgment and sentence was made, given, rendered and entered against the said A. M. Pearson in the above entitled action, whereas he was convicted as charged on count VI of the Information; and

Whereas, in said judgment and sentence, so made, given, rendered and entered against said A. M. Pearson he was by said judgment sentenced to pay a fine of Five Hundred (500) Dollars and six (6) months in the County Jail, which jail sentence was suspended upon the condition that the fine be paid, and the Defendant placed on two (2) years probation; and

Whereas, the said A. M. Pearson has filed a Notice of Appeal from the said conviction and from the said judgment and sentence, and from the fine imposed, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said A. M. Pearson has been released on his own recognizance pending the decision upon said appeal and has deposited the sum [32] of Five Hundred (500) Dollars cash, in the Registry of the United States District Court, Southern District of California, Central Division.

Now Therefore, the condition of the above obligation is such that if the said Defendant, A. M. Pearson, shall prosecute said appeal to effect, and shall pay said fine of Five Hundred (500) Dollars, if for any reason the appeal is dismissed, or if the said judgment is affirmed, then the above obligation is to be void, otherwise to remain in full force and virtue.

A. M. PEARSON

Principal

State of California

County of Los Angeles—ss.

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared A. M. Pearson, known to me to be the person who signed the foregoing instrument and who acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at Los Angeles, California, this 27th day of November, 1943.

(Seal)

FRANK L. STEARNS

Notary Public

Approved as to Form

CHARLES H. CARR

Charles H. Carr

United States Attorney

By JAMES M. CARTER

Assistant United States Attorney

I hereby certify that I have examined the within bond and that in my opinion the form hereof is correct and surety thereon is qualified.

LEE J. MYERS

Attorney for Defendant and Appellant

The foregoing bond is approved this 27th day of Nov. 1943.

BEN HARRISON

United States District Judge.

Received copy of the within *Supersedas* Bond this 27th day of November, 1943.

CHARLES H. CARR, 1J

US Atty, Attorney for Plaintiff.

[Endorsed]: Filed Nov. 27, 1943. [33]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO
SETTLE BILL OF EXCEPTIONS AND FILE
ASSIGNMENT OF ERRORS.

Upon reading and filing the Stipulation of Counsel for Plaintiff and Appellee, and Counsel for Defendant and Appellant, A. M. Pearson, and it also otherwise appearing to the Court that there is good cause therefore;

It Is Hereby Ordered tha the time within which the Bill of Exceptions can, in the above entitled action on behalf of the Appellant, be settled, is extended to and including the 15th day of January, 1944; and

It Is Further Ordered That the Defendant and Appellant may file his Assignment of Errors and proposed Bill of Exceptions on or before the 15th day of January, 1944; and

It Is Further Ordered that the plaintiff and Appellee may file its proposed Amendments, if any, to said Bill of Exceptions on or before the 25 day of January, 1944.

Dated this 23 day of December, 1943.

BEN HARRISON .

United States District Judge.

[Endorsed]: Filed Dec. 23, 1943. [35]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 36 inclusive contain full, true and correct copies of: Minute Order Entered August 11, 1943; Information; Minute Orders Entered August 23, 1943, November 17, 1943 and November 18, 1943 respectively; Verdict; Motion for New Trial; Minute Order Entered November 22, 1943; Judgment and Commitment; Notice of Appeal; Order re Supersedeas Bond; Supersedeas Bond; Stipulation Extending Time to Settle Bill of Exceptions; Order Extending Time to Settle Bill of Exceptions and Praecipe which, together with Original Bill of Exceptions, Assignment of Errors and Exhibits, transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$15.50 which sum has been paid to me by appellant.

Witness my hand and seal of said District Court this 11 day of May, 1944.

[Seal]

EDMUND L. SMITH,

Clerk

By Theodore Hocke

Theodore Hocke,

Deputy Clerk.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS.

The Aggrieved, by the decision, determination, judgment and proceedings had in the District Court of the United States, Southern District of California, Central Division, A. M. Pearson, Defendant and Appellant herein assigns the following errors in the proceedings, trial and judgment against him which he avers occurred during the trial of the case and constitute errors and each of them are to the great detriment, prejudice and injury of the Defendant and Appellant and in violation of the rights conferred upon him by the Constitution and Statutes of the United States of America. Said errors are as follows:

I.

The District Court of the United States erred in denying Defendant's and Appellant's motion for a directed verdict of acquittal on Count VI of the Information at the conclusion of the Government's case.

II.

The District Court of the United States erred in its ruling that a violation of Maximum Price Regulation No. 165, issued by Leon Henderson, as administrator of the Office of Price Administration constituted a public offense.

III.

That Count VI of the Information fails to state a public offense against the laws of the United States.

IV.

That the verdict and finding of guilt on Count VI of the Information is contrary to and is not sustained by the evidence adduced at the trial of said cause.

V.

That the verdict is contrary to law.

VI.

That the District Court erred in overruling Defendant's and Appellant's Motion for a New Trial.

VII.

That the evidence is insufficient to support the verdict.

VIII.

That the District Court of the United States erred in denying Defendant's and Appellant's Motion for a directed verdict of acquittal on Count VI of the Information, at the conclusion of all the evidence.

Each and all of said errors were duly and regularly excepted to by the Defendant and Appellant, and for which errors the Appellant prays for a reversal of the judgment.

LEE J. MYERS

Attorney for Defendant and Appellant.

Filed Jan. 14, 1944.

[Endorsed]: Filed May 13, 1944. Paul P. O'Brien, clerk.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS.

Be It Remembered, that on the 11th day of August, 1943, came the Plaintiff, the United States of America, into this Court and, with the permission of the Court, filed a certain Information against the Defendant.

To said Information the Defendant pleaded "Not Guilty, and thereupon issue was joined between them, and afterwards, to-wit, on the 17th day of November, 1943, the aforesaid issue between said parties came on regularly for trial before Honorable Ben Harrison, Judge of the United States District Court for the Southern District of California, Central Division, sitting with a jury, duly and regularly empaneled and sworn.

Plaintiff appeared by Charles H. Carr, United States Attorney, and Ernest A. Tolin, Assistant United States Attorney, and the Defendant, A. M. Pearson, appeared in person and by Lee J. Myers, his attorney.

The jury having been duly and regularly empaneled and sworn to try said cause, as aforesaid, the following proceedings, and none other, were had on [1]* the Information, and the following evidence, both oral and documentary, and none other was received.

Plaintiff offered in evidence a letter dated July 25th, 1942, written by the Defendant, A. M. Pearson, to the Office of Price Administration, Los Angeles, California, listing his prices for services on radio repairs as of March 1942. Said letter was received in evidence by stipulation as Plaintiff's Exhibit 1. It was then stipulated that said Exhibit 1 constituted Defendant's listing

*Page number appearing at foot of Bill of Exceptions.

[Testimony of Mary E. Galton.]

of his prices with his War Price and Rationing Board as required by General Maximum Price Regulation in force at all times pertinent to this action. Thereupon

MARY E. GALTON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tolin:

My name is Mary E. Galton. In the course of my work I have used the name Mary Hammond. I am a policewoman of the City of Los Angeles attached to the bunco detail detective bureau and was so employed on the 30th day of March, 1943. On the 31st of March, 1943, I had dealings with the defendant, A. M. Pearson. I entered his place of business, a store located at 5120 West Adams Boulevard. Only the defendant was present in close enough proximity to hear the conversation. I had with me a portable Zenith radio which I placed on the counter. The defendant approached me and asked me what he could do for me. I asked him if he [2] could fix this radio. He asked me what was wrong with it. I said, "one thing I knew, the batteries did not work; that I was not interested in having that fixed, but it did not work, and I would like to have him repair it. So he pointed to his left to a number of radios on the floor and said he had those to do and asked me if I would call in a few hours and by that time he would have gone through these and my radio and determined the cause of the trouble. He asked me if I had ever had it fixed before. He asked me my name, I gave him the name of Mary

[Testimony of Mary E. Galton.]

Hammond. Then he gave me a little piece of paper and had me sign it and I left. I called him two or three times and finally on the next day I had a telephone conversation in which he said, "You can have that radio in a couple of days." He said the power supply was out. He said, "You are very fortunate I happened to have the agency in town for that particular part of your radio, otherwise I think you would have a great deal of trouble in replacing it. He said it would be \$5.75. I asked him when I could obtain the radio and he said in a day or so, to call him back. I believe it was the 5th he told me it was ready. I entered his office and asked him how much it was and he said it was \$5.75 as he had stated and I paid him. He gave me a statement at that time which I recognize as Government's Exhibit No. 7, for identification. I paid him the amount shown thereon, \$5.75.

Said Government's Exhibit No. 7, for identification, was then offered and received in evidence as Government's Exhibit No. 7. [3] I obtained the radio I took to Mr. Pearson in Room 51 of the City Hall from Captain Lorensen. I obtained it approximately fifteen minutes before I took it to Mr. Pearson's shop. Captain Lorensen gave it to me, then he drove me out to Mr. Pearson's shop. He parked around the corner and I took the radio and went into the shop.

Cross-Examination

By Mr. Myers

I recognize Defendant's Exhibit No. B. The signature, Mary Hammond thereon is my signature. That is the paper I signed when I left my radio with Mr.

[Testimony of Mary E. Galton.]

Pearson. When I took my radio into Mr. Pearson he said, "What seems to be wrong?" I said, "I do not know, except that the batteries are weak and I don't want them replaced." I said, "It does not play." I did not tell him I wanted it put into first-class condition. I stated I wanted it repaired, that I would call in the evening and find out what was wrong. The radio was there five days. I do not know of my own knowledge whether there was a new tube put in the radio while it was at Mr. Pearson's. I do not know from my own investigation of the radio what parts were put in the radio or how much time Mr. Pearson spent on the repair. I don't recall that he mentioned that the rectifier tube was burned out. No mention was made of a rectifier tube that I recall, I had been told before I took the radio in there that a tube was burned out. I did not tell Mr. Pearson that. Tr. 12-19

Insert:

By Mr. Tolin:

For the purpose of correcting a typographical error in the Information, the Government moves to strike the word "October" from Line 3 of Count 6 of the Information on Page 7 thereof, and to insert instead the word "March". [4]

By Mr. Myers: Objected to as changing the cause of action.

The Court: I will allow evidence as to Count Six and require the Government to cite any authorities to show that it is proper to amend the Information in that way.

By Mr. Myers: Exception.

The Court: You make have an exception.

[Testimony of Harry M. Lorensen.]

Thereupon

HARRY M. LORENSON

was called and sworn as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Tolin:

I am a police officer of the City of Los Angeles and was on the 30th day of March, 1943. I have no direct connection with the Office of Price Administration. I know B. M. Johnson and Charles M. Barrett. On the 30th of March, 1943, I delivered a radio to Mary Galton. It was a Zenith portable. This took place in Room 51 of the City Hall. I afterward accompanied her to the Sky Pilot Radio Company, 5120 West Adams. I saw her take the radio into the Sky Pilot Radio Shop. I did not go with her. Prior to that I had taken that radio to the Standard Radio Company, 1355 South Flower Street. I did that shortly afterward on the 30th of March. I believe I delivered it to Mr. Kramer. At that time we checked all the tubes and played the radio on all stations, marked all the parts that could be replaced on the radio. We then put in a defective 117-Z 6 G tube. I then took the set back to Room 51 of the City Hall. That was done prior to the time I gave the set to Mary Galton. I saw the set again on the 5th of April when I took Mary Galton out to the Sky Radio [5] Company. She went into the repair shop and came out with the radio. I then went back to the Standard Radio shop where the set was checked over by Mr. Kramer and myself and we found that one tube had been replaced.

[Testimony of Harry M. Lorenson.]

When I first checked I marked every part in the radio. When I received the radio again from Mary Galton on the 5th of April I looked to see whether those parts were still there. All of them were in the same condition with the exception of the one tube that had been replaced. I checked all the connections that might have been soldered, all of them were there with their original solder, none of them had been replaced or worked on.

Mr. Myers: I ask the latter part of the answer be stricken out as a conclusion; on the further ground that this witness has not qualified himself as an expert to determine the condition of radios.

The Court: How do you know it was a good tube?

A. I saw it on the tester, when Mr. Barrett tested it. I saw it in the set, and saw the set play on all stations with that tube in it.

The Court: Objection overruled.

Mr. Myers: Exception.

Q. By Mr. Tolin: Did you make any observation of the radio at that time?

A. I checked all the parts that I had marked, and found that the identifications marks were on all of them, and that none of them had been replaced.

Q. Was this checking you have just testified about before or after the radio had been received from the Sky Pilot Radio Company?

A. Before and after. We also noted that the set was still covered with dust. This set had been in my bedroom for many months prior to my taking it down to the Sky Pilot Radio Company. It was littered with dust, and the dust was still there when I received [6] it

[Testimony of Harry M. Lorenson.]

back from the Sky Pilot Radio Company. The dust was cleaned off by air by Mr. Barrett.

Q. What time?

A. During the time we checked it, after receiving it back from the Sky Pilot Radio Company. As nearly as I can recall it the tube I put in the Zenith portable, the defective tube was a 117 Z 6 G. It was a Zenith type tube. I was told it was a rectifier tube. I am not a radio technician. I have had very little experience in the repair of radios. The tube was tested by Mr. Kramer. I had put a defective tube in the set. When I saw the radio after Miss Gaiton had got it back from the Sky Pilot everything was in the same condition as I originally saw it, except that a new tube had been put in to replace the defective rectifier tube which I had put in there purposely. This set (counsel at this point indicated a radio which was on the counsel table in the Courtroom) is a R. C. A. On the 30th day of March, 1943, I took my own R. C. A. radio, the one on the table there, to the Meyberg Co., 2200 Figueroa Street, where Mr. Barrett, Arthur Sheets and myself checked the radio. Mr. Barrett tested all of the tubes. I marked all the parts that might be removed. We played the radio on all stations, then took a No. 80 tube out and damaged it to the extent it would not play. We put the damaged tube back in the radio and checked it. It did not play. I then took the radio to Room 51 of the City Hall. The following day I turned the radio over to Lieut. Johnson about four o'clock on the 31st. On April 6th I accompanied Lieut. Johnson to the Sky Pilot Radio Company. He came out of the Sky Pilot Radio Com-

[Testimony of Harry M. Lorenson-B. M. Johnson.]
pany about one o'clock and gave me the radio. Officer Sheets and myself then took it to the Meyberg Company, 2200 Figueroa [7] Street, where Mr. Barrett and myself checked the set and found that two tubes had been replaced, the one tube that had been damaged and one tube that was in good condition when we brought the set in.

Cross Examination

By Mr. Myers:

When we got the set back everything was the same except there were two tubes—new tubes—in the set. The tube which we purposely blew out was a No. 80 and which I was told was a rectifier tube. This tube had been replaced when I got it back from the Sky Pilot Radio Company. There was also another new tube in the set. Otherwise, the set was identical with the condition in which it went to the Sky Pilot Radio Company. I had owned this set two or three years. I bought it second hand. I do not know how old the set is. I had never replaced any tubes in the set since I owned it and I do not know how old the tubes were that were in the set.

Thereupon

B. M. JOHNSON

was called and sworn as a witness on behalf of the Paintiff and testified as follows:

By Mr. Tolin:

I am a Detective Lieutenant in the Los Angeles Police Department, and was during March 1943. On April 6th, 1943, I had a conversation with the Defendant, A. M. Pearson at the Sky Pilot Radio Shop. Mr. Pearson,

[Testimony of B. M. Johnson.]

some lady and myself were present. I told him I had come for my radio. He told me that he had found two tubes defective and that there was trouble in the oscillating circuit and he had to replace them. I did not say anything. I paid the bill [8] he presented. I had obtained the radio from Captain Lorensen on March 31st at the City Hall, room 55. I immediately took it to the Sky Pilot Radio Company on West Adams Boulevard. After arriving there Mr. Pearson was busy with a woman. I set the radio on the counter and another chap came from the back. He asked me if I wanted my radio repaired and what was the matter with it. I told him there was a tube blown out. Mr. Pearson was within a couple of feet of me. I simply told the other party there was a tube blown out in the radio and I would like it fixed. He said "All right" and gave me a slip. Mr. Pearson was still there. I asked when I could pick up the set and he said it would be two or three days as he had a lot of work there. Nothing was said about making repairs. Exhibit 8 is the bill that was given to me when I got the radio. I paid the amount of it, \$6.45. Immediately upon receiving the radio, I took it out and gave it to Captain Lorensen.

Exhibit 8 Was Received in Evidence.

Cross Examination

By Mr. Myers:

I had no conversation with Mr. Pearson when I took the radio to the store. I apparently talked with one of his employees. He asked me what was wrong with the radio, and I told him there was a defective tube. I did not tell him which one. I knew a tube had been de-

[Testimony of B. M. Johnson.]

liberately destroyed, but I did not know which one. The employee asked me to sign an order and I signed one. Defendant's Exhibit "C" bears my signature and it is the order I signed when I took the radio to the store. I do not recall the word "Repair" being on it at the time I signed it.

Said Defendant's Exhibit "C" was received in evidence.

When I went to get the radio I saw Mr. Pearson. There was no conversation as to my identity or when the radio came in. After a great deal of looking around he found the bill. The woman was trying to help him. In a few [9] minutes he found it. He did not tell me he had done no work on the radio. He said he was sorry that it had taken him so long to fix the radio; that he had to fix it himself and worked until ten o'clock the night previous. I am not a radio technician and have no personal knowledge as to how much time either Mr. Pearson or his employee spent in locating the tube.

Direct Examination

By Mr. Tolin:

Referring to Defendant's Exhibit "C" I don't believe "repair" was on it at the time I signed it. There was nothing else on it. It was a blank. My name and address was on it. I do not recall whether the model number was on it or not. I do not believe it was. There was my telephone number, the date, my address and name. It was written by the man I talked to, not the Defendant.

[Testimony of B. M. Johnson-Charles M. Barrett.]

Cross Examination

By Mr. Myers:

I am not positive that the word "repair" was not on there but I do not recall it being there and that is as far as I intend to go. I looked at the slip before I signed it and that is the reason I do not recall it being there. I have a faint recollection of remembering that it was blank and wondering why he did not put "replace tube". I said nothing to him about it and just signed a blank order.

Thereupon

CHARLES M. BARRETT

was called and sworn as a witness on behalf of the Plaintiff and testified as follows:

Direct Examination

By Mr. Tolin:

I am a radio technician of over twenty years experience. During March, 1943, I was employed at the Leo J. Meyberg Company. During that month Mr. Lorenson who testified this morning brought a R. C. A. built-in [10] table model radio to our service department. I made a complete and thorough check of the condition of all of the component parts of the radio; the tubes, its alignment and its ability to play completely across the dial. Other than a noisy volume control the set was in good condition. The parts in the radio were marked by Captain Lorenson in my presence. The radio was filthy in-

[Testimony of Charles M. Barrett.]

side. I intentionally burned out an 80-rectifier tube, that was all, and replaced it in the set, put it back in the cabinet and returned it to Captain Lorensen. About two weeks later the set was brought back by Captain Lorensen to me at the Meyberg Co. At that time I observed that the rectifier tube I had blown out had been replaced and another tube, I believe a 6A7 converter tube, was put in. Other than that, to the best of my knowledge there was nothing else done to it. The volume control was in the same condition as before and the set had not been cleaned at all. No parts had been removed.

Cross Examination

By Mr. Myers:

I was not asked to destroy a rectifier tube. It was left to my judgment to make the set inoperative. So far as the tubes were concerned that was the most effective way to make it inoperative. To a radio technician a blown-out rectifier tube can signify many things; they are the following: It could be a shorted power transformer in your transformer set, a shorted filter, filter condenser, the speaker field coil shorted out, the frame, on rare occasions, shorted bypass condenser and also possibly a shorted tube. It might mean any one of these things. Any tube was scarce and hard to get in March 1943. If a radio set were brought to me for repairs which had blown out a rectifier tube, I definitely would not replace the rectifier tube without checking the set. If a new tube were put in and the power turned on and there was a short in the set one of two things would happen. Either the plates on the rectified tube would turn red or there would be a blue glow around the filament. If you turned it off im-

[Testimony of Charles M. Barrett.]

mediately it would not destroy the efficiency of the tube but you are taking chances. It might blow out instantly. If the set were brought in to me in that condition I would not check all of the [11] things I have mentioned as possible contributing causes. I would check the power transformer, the filter and the condenser. You check all of these things in one or two operations. One check covers all of these component parts. I was connected with a large wholesale house at the time and we had the most modern testing equipment. The small shops did not have this equipment. Without that modern up-to-date equipment they could make that one test. I am positive of that. The type of equipment that would make that test is an ohmmeter. This set is approximately six years old. I do not know how old the tubes were. When the set came back to me I found that no parts had been removed except the two tubes which had been replaced with new tubes. When I destroyed the rectifier tube and returned it back to Mr. Lorensen the set would not play.

The Court:

Would you due to the shortage of tubes, if there were a tube still in the set that enabled the set to work, would you replace it?

Answer: If the set would work I would call the customer's attention to it, certainly that there was a weak tube, but I would advise that they continue using it as long as they could.

By Mr. Myers:

The other tube which was replaced was a 6A7 a. It could have been a 6D6. There is a 6 D 6 tube used in that set. It is an intermediate frequency tube. There

[Testimony of Charles M. Barrett-Walter Kramer.]
are two places on a tube of that type that could short-circuit. The tube may be partially short-circuited and still play. If a radio set were brought in to me and I was asked to put it in first class condition and I found two shorted circuits on the 6D6 tube I would have to replace it to put it in first class shape, but you could get some reception out of the set with that short circuit.

Thereupon

WALTER KRAMER

called as a witness by and on behalf of the plaintiff having been first duly [12] sworn, was examined and testified as follows:

Direct Examination

By Mr. Tolin:

I am manager of an electrical and radio store located at 1355 South Flower. I have been in business there around twenty years and during that time have done quite a bit of repair work with respect to radios. During March of this year our repair work ran to a dozen sets a day. I am not sure of the name Lorensen, but I did receive a radio set during the latter part of March, this year. I think from that gentleman that was on the stand. I did receive a Zenith set. When that set was brought into me it was set up and we started to play it. It seemed O. K. I gave it back to Mr. Lorensen. It was playing all right. Before he left he asked for a burned out tube for it.

Cross Examination

By Mr. Myers:

When the set was brought in to my place I hooked it up and it played all right. That is the only checking I

[Testimony of Walter Kramer-Mrs. Charles A. Leake.]
did. Then I was asked for a defective tube. I wouldn't want to say whether Mr. Lorensen specified the type of tube he wanted. When I gave him the defective tube I took out the good one it was to replace. I put the defective tube in the set and by putting the defective tube in the set it wouldn't play. The name of that particular tube is 117 Z 6. I have been a radio technician about twenty years. A blown out or defective rectifier tube in a set indicates to me as a radio technician, in most cases a shorted filter condenser, a by-pass condenser would cause that. As to whether any other shorts would cause it, my answer is no, except the tube itself, a defective tube. If it was a short, as indicated by the blown out tube, and you put another tube in there and turned the set on it would blow it out. As to my opinion as a radio technician as to [13] whether it would be proper practice for a radio repairman to put a new rectifier tube in a set of that kind without first checking it entirely, my answer is I think it would be up to the customer. I think a survey should be made to make sure that the parts are not defective. If that was not asked for, in other words, if he asked for a tube or to replace a tube we would replace the tube and the responsibility would be on the customer. [14]

MRS. CHARLES A. LEAKE

called as a witness by and on behalf of the plaintiff having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tolin:

I know Mr. Pearson. Some time this year my son and I took our radio into his shop. I asked him how much

Testimony of Mrs. Charles A. Leake.]

it would cost to eliminate a slight smoking of the radio. When we got to his shop we did not talk to Mr. Pearson, we talked to a young man. Afterwards I talked with Mr. Pearson on the telephone. It was several days later. I called him and I asked him what the charges would be for fixing the radio up. He asked me what the complaint was. I told him that I had explained all that to the young man I talked to when we took the radio in. I told him the radio was playing perfectly when we took it in, but after it played an your or two it would smoke a bit and there would be a slight odor. I wanted to know what would have to be done to it to eliminate that trouble and I believe he said he would check it again. At the next conversation I had with him he told me it would cost \$6.00 and some cents to put in a new tube, or two; I don't know how many. There was something to be done, and a filter. There were three different things he suggested to me for consideration. The total of that was about \$6.75 or something like that. The radio was a Packard-Bell table model. I did not tell him to do the work. I told him not to do anything about it, that the price was a little bit more than I had expected to pay to have the radio fixed and not to do anything more about it, that I would talk to my housband about it and let him know. [15] I talked to my husband about it then later I called him up and told him that I did not want that work done, that we would pick it up. I remember the price he quoted. It was around \$6.00 for those three things, that was what he wanted to do the particular work that I spoke of at that time. When I went to get the radio he said that looking it over again he had found that I needed a new transformer. He said he would

Testimony of Mrs. Charles A. Leake.]

charge \$14.00 to put in a new transformer. I said we couldn't consider spending so much on a small radio that we would pick it up the first time we had the car. The \$14.00 was just for the transformer. I did not have the car with me that day and did not pick up the radio that day. Afterwards I went for it. He told me there was some service charge for inspecting it. I asked him how much it was and he said that up to that time it was \$3.50. I told him I thought that was an outrageous price for inspecting the radio and I would not pay it. He would not let me take the radio so I left it and then I went back again and tried to get my radio. Then he said the service charge was \$6.50. I told him I would sue him before I would pay it. I finally paid it because the O. P. A. told me I had to pay it to get my radio out. Nothing was done to it at all, except it played when I took it in and it did not play when I took it out. I asked him to explain to me the difference between the first service charge of \$3.50 and the final service charge of \$6.50. I asked him why it had come up to \$6.50. He said that was the bill, take it or leave it. I recognize the paper as this bill. The document was marked Government's Exhibit No. 11, for identification. [16]

Cross Examination

By Mr. Myers:

I own a Packard-Bell table model radio. I have had it five or six years. It played perfectly. There was a slight odor that came from it, like burning rubber, after I played it a while. I wanted that corrected and took it to Mr. Pearson's radio shop. I saw Mr. Pearson there when I took it in but did not talk to him then. I did

Testimony of Mrs. Charles A. Leake.]

not leave the set there to be repaired. I didn't want that condition corrected until I knew what it was going to cost. I said for him to call me three or four days. They were to call me and let me know then. Then I called him. He told me that these three different things would put the set in better condition. I asked him if that would do away with the smoking, and he said yes. I told him that was more than we really wanted to spend on the little radio and not to do anything to it until I talked to my husband about it. Mr. Pearson did not say to me that it was a rather puzzling condition, that he had found in this radio. He didn't tell me that it was a rather perplexing problem to him. He didn't tell me that he spent some time working with the set to ascertain just what was the cause of that condition. He told me that he had rechecked it and in spite of the fact that I had told him that I did not want to spend around \$6.00 he rechecked it and found that what I needed was a new transformer. I did not tell him that I was willing to spend \$6.00 on the set and did not want it to run any more than that. The original estimate that he gave me for the three things he suggested ran to around \$6.00. It seems to me it was a little bit more; some odd cents. \$6.00 and some odd cents. [17] \$14.00 had nothing to do with the original estimate. Later he mentioned \$14.00. At first he said \$6.00 and some odd cents would eliminate the trouble. Then later he told me that it needed a new transformer. I don't remember that he said that the burning or smoking was caused by a condenser. He said that to eliminate that it would increase the amount of the bill over the original estimate. When I got the radio he gave me this bill which I recognize as Governments

Testimony of Mrs. Charles A. Leake.]

Exhibit No. 11, for identification. Tr. Vol. 1, 104-129. He wrote all this matter that is in purple ink that is on Government's Exhibit No. 11 at the time I got my bill. I did not have my glasses with me but he read it to me. He told me the tubes and pilots were old but that they were working all right. I paid Mr. Pearson \$6.50. I think he read me at that time the amount of time he had spent on the set as indicated on Government's Exhibit No. 11; 3 hours, 11 minutes.

By the Court: Let me see if I understand your testimony. Correct me if I am in error: The first time you took your radio down there you told him the trouble, as you have described here, with the radio, and he inspected the radio? A. Not then.

Q. But he told you there were three possible things wrong with it?

A. Yes, later on, when I called him up.

Q. You called and asked him for an estimate?

A. Yes.

Q. He told you it would cost you something over \$6.00? A. Yes [18]

Q. As I understand your testimony, you told him not to go ahead until you talked to your husband?

A. Yes.

Q. Did you ever thereafter tell him to go ahead?

A. No.

Q. Then you went down some other time and he told you it also needed a new transformer, and that transformer would cost you \$14.00? A. Yes.

Q. He told you there was a service charge of three dollars and something? A. Yes.

[Testimony of Mrs. Charles A. Leake-H. L. Burks.]

Q. Then you refused to pay it? A. Yes.

Q. Then afterward you went back again for it, and he said then that the service charge was six dollars and something? A. Yes.

Q. Thereafter you did pay him \$6.50?

A. After.

Q. You at no time then, as I understand it, told him to do any work on your radio?

A. Definitely no.

Q. By Mr. Myers: Did you indicate to Mr. Pearson at any time what amount you were willing to spend on the set? A. Never.

Mr. Myers: I think that is all." Tr. Vol. 1 116-118.

H. L. BURKS

called as a witness by and on behalf of the plaintiff having been first duly sworn, was examined and testified as follows: [19]

Direct Examination

By Mr. Tolin:

I have been a radio technician for fourteen years and have been engaged in that work in and about Los Angeles for three years. It is ordinarily not necessary in replacing a rectifier tube to make a detailed check of the radio. I am familiar with the standard RMS service charge. As to the item of \$1.00 for tube inspection, that inspection includes an examination of the radio and tubes to the extent that the serviceman will be able to render a reasonably accurate estimate of the repairs.

[Testimony of H. L. Burks.]

Cross Examination

By Mr. Myers:

Certain types of rectifier tubes wear out with use and certain types do not. Type 117Z6 is a very short lived tube, and it does wear out with use. The filament often times blows out, and is very commonly spoken of as being blown out. The first cause of the blowing out of the rectifier tube is the number of times it has been turned on and off, the second cause would a shorted filter condenser. A short in other parts of the radio might cause that blowing out other than the filter. It would almost have to be a short circuit in the wire itself. Where you do not know the cause of the rectifier blowing out it is not customary to make a thorough check of the radio before putting one in. I don't do that. I don't disagree with Mr. Barrett who testified here yesterday. It may have been difficult for some of the trade to get rectifier tubes last December; we happened to have quite a large number. I do not know that there have been no new tubes made for some time. If it was a short in the condenser which had blown out the original rectifier tube if you put in a new recti- [20] fier tube and turn on the power it would blow that tube out if you were not watching the tube closely. The new tube may have to stay three minutes to blow. You are supposed to be watching the tube to see the condition of it and the rectifier tube could be subject to a short circuit and, the power supplied for short periods of time, without ruining it. I have seen 117 Z 6 rectifier tubes worn out from use only. I have seen some that were blown out by short circuit in the set. It takes 5 minutes to tell whether there is a

[Testimony of H. L. Burks.]

shortage in a condenser or in the power supply which caused a rectifier tube to blow out.

The Government did not introduce any evidence on Counts Two, Three, Seven and Eight and moved that they be dismissed, which Motion was granted.

The Court dismissed Count Nine of its own motion because of insufficiency of the evidence.

The Defendant was acquitted under Counts One, Four, Five, Ten and Eleven, and as said Counts charged sales of merchandise above ceiling prices and did not involve sales of services, the testimony pertinent to said counts is not here set forth.

MR. TOLIN.

The Government renews its motion to amend Count Six of the Information by deleting from the first line the word "October" and inserting in lieu thereof the word "March".

The Court: The Information is so amended by interlineation.

Mr. Myers: Exception please?

The Court: Exception noted. [21]

Plaintiff Rests.

Thereupon the Defendant Moved the Court for an Instructed Verdict of Acquittal of Count VI of the Information on the ground that the Plaintiff's evidence failed to prove the commission of a public offense or the commission of the offense charged in the Information. Said Motion Was Over-ruled, to which ruling the Defendant then and there excepted.

[Testimony of A. M. Pearson.]

Thereupon

A. M. PEARSON

was called as a witness on behalf of the Defendant, and testified as follows:

Direct Examination

By Mr. Myers:

I am the Defendant in this action. I operate a radio repair shop under the name of Sky Pilot Radio Company at 5120 West Adams Boulevard, Los Angeles, California. I have been in business at this general location for the past fifteen years. Prior to that time I was engaged in Electrical Construction Work for several large companies. I am married and have three children.

I did not take in the Johnson R. C. A. radio for repairs. It was taken in by my son who is now in Ireland. He is a radio technician of approximately ten years experience, and he is now employed as such. I did no work on the Johnson radio other than check his work and I watched what he was doing.

By the Court: If he was an experienced technician why did you watch him?

A. I am supposed to be the manager in the shop. I am supposed to see [22] everything.

By Mr. Myers:

I do not remember whether I delivered the set to Mr. Johnson. Since you hand me Plaintiff's Exhibit 8, I evidently did because Plaintiff's Exhibit 8 is in my hand writing. It is the bill I made out for the work done on the radio. I made it up from my son's time as he gave it to me. I have the original record turned in by my son for this job, which is in his writing. The pay roll

[Testimony of A. M. Pearson.]

sheet is made up from this record. There are other jobs on this paper. It shows continuous work. In the left hand column the job numbers are listed as they appear on our original tickets. No. 8553 is the Johnson job. From this record (witness reads from record) the time spent on the Johnson job was as follows:

April 2nd—from 2:10 p.m. to 3:00 p.m.—50 minutes

April 2nd " 4:10 p.m. to 5:25 p.m.—1 Hr. 15
Min.

or a total of two hours and five minutes. It was from this record that I made up the Johnson bill. All of this record is in my son's writing. Except the writing in purple ink. Mr. Myers, I will offer this. (Defendant's Exhibit G for Identification.)

The Court:

You have read the important part. Why encumber the record.

Mr. Myers: It is quite agreeable to me.

Witness Continues.

In addition to the work done, there were two new tubes supplied, a No. 80 tube at 70 cents and a 6D6 tube at \$1.00. Sales tax on the two tubes was 5 cents. The total labor charge was \$4.70, \$4.20 for my son and 50 cents figured for myself. I charged for fifteen minutes time that I put in checking the work, checking the statement, taking the merchandise out of stock, making the billing, and the actual contact with the customer when he took the radio, and delivering the radio to the customer. The price charged was the same as charged in March 1942 for similar time and service. The price charged for the [23] tubes was the same as charged in March 1942.

[Testimony of A. M. Pearson.]

By the Court: Do I understand, if I took my radio into your shop, and asked you to put in a tube, as Mr. Johnson testified, you can put in two tubes, and charge me four dollars and something for the time besides without any instructions from me?

By the Witness: We would only do what you instructed us to do; we wouldn't do anything different than we are instructed.

By the Court: If Mr. Johnson came in and instructed you to put in a tube, that is what you would do?

A. Not necessarily.

Q. If he told you the tube was out, and he wanted you to put it in?

A. If he said a rectifier tube I would refuse to handle the job unless he let us check over the set.

Q. Did you have authority from the customer first?

A. Yes, we had a signed order to repair the radio; not to put a tube in the radio; a signed order, in which the word "Repair" appears. We wouldn't ever just put an 80 tube, or rectifying tube, in that radio without checking it. It's not our policy, it never has been our policy, in March of last year, or any other time.

Witness Continues.

By Mr. Meyers: The writing on Plaintiff's Exhibit "C" is all in my son's handwriting except the signature and the number on the ticket. The word "Repair" is in my son's handwriting.

To me as a radio technician a blown-out rectifier tube indicates a short circuit somewhere in the set, and if a new tube were put in and the power turned on, it would immediately blow the tube out, if there was a short in

[Testimony of A. M. Pearson.]

the set. Tubes were short and hard to get in April 1943 and it was our policy when we had an order to "Repair" not to put in a new rectifier tube until the [24] set was checked to ascertain the cause of the blow-out. That would not apply to an amplifier tube.

I did not tell Mr. Johnson when I delivered the set that I had personally worked on the set and that I had worked on the set until 10 o'clock the previous night. I did say I had been working late—until 10 o'clock many nights to get out the work that had to be done. but I did not say I was working on his radio.

I did not take in the radio from Mrs. Leake, my daughter-in-law did. It first came to my attention May 5, 1943. At that time the set was in the store for a report, not for repairs. I did give that set a quick check over. My check did not reveal any mechanical difficulty. I did not talk with Mrs. Leake until five days later. That was a personal call on the 14th of May. She called at the store, I talked to her personally myself. I told her the first preliminary examination I made of the radio made me believe there was nothing wrong. I simply put a \$1.00 minimum charge on the set. I told her I had done so. Afterwards I talked to the party who took the radio in the shop. He assured me there was trouble in the radio and that I had better go through the set again because the customer said there was something wrong. When I first checked the set I had not been advised of the claimed trouble in the set. There did not appear to be any trouble with the radio. I simply had the order to report on the radio. When I talked with Mrs. Leake she insisted there was trouble with the radio. I went through the set very

[Testimony of A. M. Pearson.]

carefully and checked up on the tubes, condenser and other things. I reviewed with Mrs. Leake what I had done up to the time of the call. At that time she told me the set developed smoke after it had run two hours or more continuously. Up to that time I had not run the set two hours continuously and did not know that it did heat up after two hours' operation. She asked me to check further to see what caused the heat.

I made individual checks on the transformer; that is, I disconnected the leads from the rectifying tube, and made individual checks from plate to plate; also from plate to ground; one reading from the plate to the ground was 90 volts; the other reading from the plate to the ground was 120 volts. The [25] two readings should be identical. However, in reading we are allowed 20 per cent tolerance; the reading could be 20 per cent different, and not affect the operation of the set. This was slightly over 20 per cent, which would indicate trouble in the output; possible trouble but not necessarily, because I have handled lots which showed that much difference in the reading, and would play perfectly continuously over many hours of service, with no trouble. I made resistance readings from plate to plate; also voltage readings from plate to plate. Then I checked up on the load on the transformer; the current required of the tubes that were in the set; the current required had to be up to the voltage, and the individual current I figured out, as to what was necessary in the current consumption, and how many windings were in the transformer, and I found that the transformer had to have three secondary windings, one 5-volt winding, with

[Testimony of A. M. Pearson.]

2-amp. capacity, one 2-1/2 volt winding with 5/3/3-amp., and the high voltage.

I then told Mrs. Leake I could go ahead with the job, change the transformer, if she wanted me to. She asked me what it would cost. I told her I didn't know, that I would have to do the work and give her a bill for what was done, plus the time I worked on the radio, and the tube and labor might run as much as \$14.00. I told her the radio did not have that value because it had served its useful life, that she ought not put that much money into it. I made no repairs on that set, all I did was to check on the set.

The Court: I would like to ask him a question:

Q. You heard Mrs. *Leak* testify that she came in there and wanted her radio, and you said it would be three dollars and something, and she refused to pay it; did she ever ask for the radio?

A. No, sir, she did not ask for the radio. She particularly asked me to keep it and do more work on the radio at that time.

Q. Her testimony was to the effect that she came in for the radio, and asked for it, and you made the statement that it would be three dollars. Is that true?

A. It is definitely not true. [26]

Q. Also that she came later and asked for it, and you said your bill was \$6.50. That is true, is it?

A. That is true, yes.

Referring to the Mary Galton, also known as Mary Hammond. job I recognize Defendant's Exhibit "B". It is the original order. I recall the transaction. When the radio was brought into my store Miss Galton said

[Testimony of A. M. Pearson.]

the radio needed repairs and was not playing, and wanted me to repair it. I asked her if there was any music coming from it. I asked her first what was her complaint on the radio. Why she wanted the radio repaired, was it in the set or was it a question of quality, or was it not playing. She said, "I do not know except that the radio is dead. I want the radio repaired." I made out the order and she signed it. Everything on the order was there when she signed it. After taking in the set I worked on it. I removed the *chasis* from the cabinet, checked the filter condenser and various working parts in the set. The only trouble I found in the set was the rectifying tube, it was out and defective. To me, as a radio technician, a blown out rectifier tube indicates some trouble in the set. Something breaking down under load which does not occur under no load. With the best testing equipment some times a part will test good under no load and you put a load on it and it will blow just as an inner tube will blow if you put too much air in it. I put a volt meter in and I put a tube in the set and watched the voltage up to what I considered normal. A blown out rectifier tube indicates almost positively a short circuit somewhere in the set. A tube of this type seldom wears out with age. If there is a short in the set and you put in a new tube without locating the short it could burn out \$6 or \$8 worth of tubes instantly. In order to ascertain the cause of a short the filter must be checked with a meter. The set must be worked over very thoroughly and carefully and if no trouble is found a check must be made of everything that is done and you must look over it again much more carefully and more diligently to see what is causing the trouble. Miss Galton

[Testimony of A. M. Pearson.]

did not tell me that it had a tube out. After examining the set carefully and finding nothing wrong other than the tube, I replaced the rectifier tube, connected a voltmeter, and warmed up the set and had an A. C. cord so that I could jerk it out instantly if the voltage went too high. As nothing happened [26A] I completed the job. The price of the rectifier tube was \$1.60 which is the same price in March, 1942. The remainder of the bill represented labor and tax, and possibly shop expense. The total time spent was two hours and twenty minutes, in broken periods of time. The total labor charged was \$4.80. Labor was charged at the same rate as we charged for similar services in March, 1942.

Cross Examination

By Mr. Tolin:

The work I did on the Johnson radio was to check the radio after my employee finished his work. I turned the radio on and listened to it; I checked to see that each station came in where it appears on the dial, and it brought in the different stations, I thought, with reasonable volume. That was my inspection, and I O. K.'d the job. Then I took the merchandise and checked to see that the merchandise was correct and that it was used in the radio. I checked that to see that it was exactly as stated by my employee. I put in fifteen minutes doing these things. This was included in my bill. The only thing other than time that was put in the radio were the two tubes.

Defendant Rests.

Thereupon

Defendant moved the Court for a directed verdict of acquittal on Count VI of the Information, on the grounds that the evidence failed to prove the commission of a public offense or the commission of the offense charged in Count VI of the Information.

Said Motion was overruled to which ruling the Defendant then and there excepted.

Thereupon

The Court instructed the Jury.

No exceptions were taken to the Court's instructions.

Thereupon

The Jury retired in charge of the Bailiff, who was sworn according to law. [27]

Thereafter

On November 18, 1943, the Jury returned a verdict of "Guilty" upon Count VI of the Information.

Thereupon

The Court set Monday, November 22, 1943, at 2:00 P.M. as the time for pronouncing judgment and sentence.

Thereafter

On November 22nd, 1943, and within three days from the entry of the verdict the Defendant filed a Motion for a New Trial in words and figures as follows:

Title of Court and Cause.

Now Comes the Defendant, A. M. Pearson, and moves the Court to set aside the verdict of the jury returned in

the above entitled action on November 18th, 1943, and to grant a new trial on Count VI of the Information on the following grounds, to-wit:

1. The verdict is contrary to law.

2. The evidence was insufficient to justify the verdict in that there was no substantial evidence to show that the Defendant did any work upon the radio of D. M. Johnson, or that he had any personal knowledge as to the amount of work which had been done upon it; that the Complainant Johnson testified that the radio was delivered to an employee who made out an order which Johnson signed and which is in evidence; the undisputed evidence of the Defendant was that he did no work upon the radio and made up a bill based upon time reports turned into him by the employee, which time was charged at rates listed with the Office of Price Administration.

3. Count VI of the Information does not state facts sufficient to constitute the crime charged.

4. Count VI of the Information does not charge a crime under the laws of the United States. [28]

5. The Court erred in refusing to direct a verdict of acquittal on Count VI at the conclusion of the Government's case to which refusal the Defendant excepted.

6. The Court erred in the instruction given to the jury after the jury had retired to deliberate upon the verdict and returned into Court and requested further instructions, to which the Defendant excepted.

7. The Court erred in referring to Defendant's requested Instruction Number 10.

Dated this 20th day of November, 1943.

LEE J. MYERS

Attorney for Defendant [29]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10621

A. M. Pearson,

Appellant,

v.

United States of America,

Appellee.

STIPULATION.

Whereas, the Government's and the Defendant's exhibits in evidence in the above entitled action, which are on file in the office of the Clerk of the United States District Court, Southern District of California, Central Division, are in many instances very difficult, and in some cases impossible to reproduce either by typewriting or by *pringing*, and

Whereas, the exhibits contain matters which both parties desire the Court to see in their original form, and

Whereas, some of said exhibits contain notations in the handwriting of various persons which both parties believe should be certified directly to the United States Circuit Court of Appeals for the Ninth Circuit by the District Court for the purposes of this appeal, and

Whereas, both the appellant and appellee desire to avoid the expense of copying all of these bodily into the Bill of Exceptions, and the expense of printing thereof.

Now Therefore,

It Is Hereby Stipulated and Agreed by and between the appellant, A. M. Pearson, and the appellee, United States of America, by and through their respective attorneys, subject, nevertheless, to the approval of the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

1. That each and all of the hereinafter mentioned and designated exhibits in evidence, which are herein referred to respectively by the numbers given them by the Clerk of said District Court at the time of the trial herein, may be deemed by reference to be incorporated in the Bill of Exceptions both [30] generally and respectively where and wherever references are made to them by such numbers in the body and context of said Bill of Exceptions to the same effect and purport as though each and all of said exhibits were fully set forth, word for word, figure for figure, and picture for picture in said Bill of Exceptions:

2. That the District Court may, after passing upon appellee's proposed amendments thereto, sign and settle said Bill of Exceptions, and may include therein a copy of this stipulation in lieu of including therein, either in substance or in full, copies of each and all of the hereinafter designated exhibits in evidence, and that thereupon, each of said exhibits shall be deemed to be included in said Bill of Exceptions to the same effect and purport as though such and all of said exhibits were fully set forth therein as aforesaid:

3. That the exhibits to be so included are as follows:

| Government's Exhibit No. 1 | | | |
|----------------------------|---|---|----|
| " | " | " | 2 |
| " | " | " | 3 |
| " | " | " | 4 |
| " | " | " | 5 |
| " | " | " | 6 |
| " | " | " | 7 |
| " | " | " | 8 |
| " | " | " | 10 |
| " | " | " | 11 |

| Defendant's | Exhibit | No. | Allegation |
|-------------|---------|-----|------------|
| " | " | " | B |
| " | " | " | C |
| " | " | " | D |
| " | " | " | F |
| " | " | " | H |
| " | " | " | I |
| " | " | " | J |

4. That the United States District Court in and for the Southern District of California may make an order that all of the foregoing designated [31] exhibits be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and for the safekeeping, transportation, and return thereof, at the cost of the appellant, to be paid to the Clerk of said District Court upon demand;

5. This stipulation in no wise constitutes a waiver of any objections and exceptions to the introduction of any exhibits by the District Court.

Dated:

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Asst. United States Attorney

ERNEST A. TOLIN

Asst. United States Attorney

Attorneys for Appellee

LEE J. MYERS

Attorney for Appellant

It is so ordered:

Judge of the United States Circuit Court of Appeals for
the Ninth Circuit

Thereafter the following order was made by the United States District Court:

In the District Court of the United States in and
for the Southern District of California
Central Division [32]
No. 16149

A. M. PEARSON,

Defendant & Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff & Appellee

ORDER ON STIPULATION

Upon stipulation of the parties, which has been approved by the United States Circuit Court of Appeals for the Ninth Circuit, it is ordered that the Clerk of the Court transmit to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Bill of Exceptions, the following Government's Exhibits and *Plaintiff's* Exhibits which are hereby incorporated into this Bill of Exceptions by this reference thereto. Said Exhibits are as follows:

| | |
|--------------------------|----|
| Government's Exhibit No. | 1 |
| ” ” ” | 2 |
| ” ” ” | 3 |
| ” ” ” | 4 |
| ” ” ” | 5 |
| ” ” ” | 6 |
| ” ” ” | 7 |
| ” ” ” | 8 |
| ” ” ” | 10 |
| ” ” ” | 11 |

| <i>Plaintiff's</i> | Exhibit | No. | A |
|--------------------|---------|-----|---|
| " | " | " | B |
| " | " | " | C |
| " | " | " | D |
| " | " | " | F |
| " | " | " | H |
| " | " | " | I |
| " | " | " | J |

Harrison

United States District Judge [33]

JUDGE'S CERTIFICATE.

The foregoing Bill of Exceptions, together with the Exhibits therein mentioned and made a part hereof by Stipulation, contains all the evidence adduced on the trial of this cause, and correctly shows the various proceedings during the trial, as well as subsequent thereto. The same being true and correct, it is accordingly settled and allowed as a true Bill of Exceptions in this cause.

Dated this 29th day of April, 1944.

Ben Harrison

Examined and approved as an accurate bill.

Ernest H. Tolin

Asst. U. S. Attorney

Lee J. Myers,

Atty for Defendant & Appellant

[Endorsed]: Filed May 1, 1944. [34]

[Endorsed]: No. 10621. United States Circuit Court of Appeals for the Ninth Circuit. A. M. Pearson, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 13, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10621

A. M. PEARSON,

Defendant and Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff and Appellee

STATEMENT OF THE POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON AP-
PEAL, AND DESIGNATION OF THE PARTS
OF THE RECORD WHICH APPELLANT
THINKS NECESSARY FOR THE CONSID-
ERATION OF SAID POINTS.

To the Honorable Justice Curtis D. Wilbur, and Asso-
ciate Justices of the United States Circuit Court of
Appeals for the Ninth Circuit:

Appellant respectfully states that the following are the
Points upon which he intends to rely on Appeal, to-wit:

1. That Count VI of the Information upon which
Appellant was convicted, does not state a public offense
against the laws of the United States;

2. The verdict and finding of guilt on Count VI of
the Information is contrary to law;

3. That the verdict and finding of guilt on Count VI of the Information is contrary to the evidence, and the evidence is insufficient to support the verdict;

4. The District Court erred in denying Appellant's Motion for a directed verdict of acquittal at the conclusion of the Government's case, and at the conclusion of all the evidence;

5. The District Court erred in overruling Appellant's Motion for a New Trial.

Appellant designates the following documents and parts of the Record which he thinks necessary for the consideration of the foregoing Points, on Appeal, to-wit:

1. Preamble and Count VI of the Information;
2. Record of Arraignment and Plea;
3. Verdict of the jury;
4. Motion for New Trial;
5. Ruling on Motion for New Trial;
6. Judgment and Sentence;
7. Notice of Appeal and Grounds of Appeal;
8. Supersedeas Bond and Order Approving same;
9. Order of the District Court extending Time within which to Settle Bill of Exceptions and to File Assignment of Errors;
10. Assignment of Errors;
11. Bill of Exceptions;
12. Plaintiff's Exhibits 1 and 8, and Defendant's Exhibit "C";

13. Statement of Points;
14. Designation of Documents and Proceedings upon which Appellant relies on Appeal;
15. Names and addresses of Attorneys.

Respectfully submitted,

Lee J. Myers

Attorney for Appellant.

RECEIPT.

Received a copy of the foregoing Statement of Points and Designation of Documents and Proceedings upon which Appellant relies on Appeal.

Charles H. Carr,
U. S. Atty.

CHARLES H. CARR,
United States Attorney,

By Mary Wentworth

[Endorsed]: Filed Jun. 2, 1944. Paul P. O'Brien,
clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION.

Whereas, the Government's and the Defendant's exhibits in evidence in the above entitled action, which are on file in the office of the Clerk of the United States District Court, Southern District of California, Central Division, are in many instances very difficult, and in some cases impossible to reproduce either by typewriting or by printing, and

Whereas, the exhibits contain matters which both parties desire the Court to see in their original form, and

Whereas, some of said exhibits contain notations in the handwriting of various persons which both parties believe should be certified directly to the United States Circuit Court of Appeals for the Ninth Circuit by the District Court for the purposes of this appeal, and

Whereas, both the appellant and appellee desire to avoid the expense of copying all of these bodily into the Bill of Exceptions, and the expense of printing thereof.

Now Therefore,

It Is Hereby Stipulated and Agreed by and between the appellant, A. M. Pearson, and the appellee, United States of America, by and through their respective attorneys, subject, nevertheless, to the Approval of the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

1. That each and all of the hereinafter mentioned and designated exhibits in evidence, which are herein referred to respectively by the numbers given them by the Clerk of said District Court at the time of the trial herein, may be deemed by reference to be incorporated in the Bill of Exceptions both generally and respectively where and wherever references are made to them by such numbers in the body and context of said Bill of Exceptions to the same effect and purport as though each and all of said exhibits were fully set forth, word for word, figure for figure, and picture for picture in said Bill of Exceptions;

2. That the District Court may, after passing upon appellee's proposed amendments thereto, sign and settle said Bill of Exceptions, and may include therein a copy of this stipulation in lieu of including therein, either in substance or in full, copies of each and all of the hereinafter designated exhibits in evidence, and that thereupon, each of said exhibits shall be deemed to be included in said Bill of Exceptions to the same effect and purport as though such and all of said exhibits were fully set forth therein as aforesaid:

3. That the exhibits to be so included are as follows:

| | |
|--------------------------|---|
| Government's Exhibit No. | 1 |
| ” | 2 |
| ” | 3 |

Government's Exhibit No. 4

| | | | |
|---|---|---|----|
| ” | ” | ” | 5 |
| ” | ” | ” | 6 |
| ” | ” | ” | 7 |
| ” | ” | ” | 8 |
| ” | ” | ” | 10 |
| ” | ” | ” | 11 |

Defendant's Exhibit No. A

| | | | |
|---|---|---|---|
| ” | ” | ” | B |
| ” | ” | ” | C |
| ” | ” | ” | D |
| ” | ” | ” | F |
| ” | ” | ” | H |
| ” | ” | ” | I |
| ” | ” | ” | J |

4. That the United States District Court in and for the Southern District of California may make an order that all of the foregoing designated exhibits be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and for the safekeeping, transportation, and return thereof, at the cost of the appellant, to be paid to the Clerk of said District Court upon demand:

5. This stipulation in no wise constitutes a waiver of any objections and exceptions to the introduction of any exhibits by the District Court.

Dated: April 29, 1944.

CHARLES H. CARR
United States Attorney

JAMES M. CARTER
Assistant United States Attorney

Ernest A. Tolin
ERNEST A. TOLIN
Assistant United States Attorney
Attorneys for Appellee

Lee J. Myers
LEE J. MYERS
Attorney for Appellant

It Is So Ordered:

Albert Lee Stephens C J.

.....
.....
.....

[Endorsed]: Filed May 5, 1944. Paul P. O'Brien,
clerk.

No. 10621.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

A. M. PEARSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

LEE J. MYERS,

608 South Hill Street, Los Angeles 14,

Attorney for Appellant.

FILED

SEP - 1944

PAUL F. O'BRIEN,
CLERK

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No. 10621.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

A. M. PEARSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

Jurisdiction.

This is an appeal by the defendant from a judgment of conviction and sentence of the United States District Court for the Southern District of California in an action brought by the United States of America for an alleged violation of Maximum Price Regulation No. 165, as Amended, issued by Leon Henderson, as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942. Judgment was entered November 22nd, 1943 and Notice of Appeal was filed November 26th, 1943.

Jurisdiction of the District Court was invoked under Section 205(b) of the Emergency Price Control Act (50 U. S. C. A. 925-c), and jurisdiction of this court is invoked under Title 18, Section 687 (U. S. C. A. 925-c) and Rule 3 of the Rules of Criminal Procedure, promulgated by the Supreme Court.

Statutes and Regulations Involved.

This action involves the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 165, as Amended (7 F. R. 10557) issued by the Office of Price Administration.

The sections of the Act, and of the regulations involved, and the pertinent provisions of each are as follows:

EMERGENCY PRICE CONTROL ACT.

Section 2(a) authorizes the Price Administrator, by Regulation or Order to establish such maximum price or maximum prices on commodities as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.

Section 4(a) reads:

“It shall be unlawful * * * for any person to sell or deliver any commodity * * * in violation of any regulation or order under section 2, * * * or to offer, solicit, attempt, or agree to do any of the foregoing.”

Section 302(c) defines the term “commodity” to include:

“Services rendered otherwise than as an employee in connection with the * * * repair * * * of a commodity or in connection with the operation of any service establishment for the servicing of a commodity.”

Section 205(b):

“Any person who willfully violates any provision of Section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than \$5,000, etc. * * *”

MAXIMUM PRICE REGULATION NO. 165, AS AMENDED.

Section 1499.101(a):

“Sales. No ‘person’ shall ‘sell’ or supply any of the ‘services’ set forth in paragraph (c) of this section at a price higher than the maximum price permitted by this Maximum Price Regulation No. 165, as amended.”

Section 1499.101(c):

“Services covered. This Maximum Price Regulation No. 165, as amended shall apply to all rates and charges for the following services, except when such services are rendered as an employee.”

Section 1499.101(c-45):

“Radios * * * maintenance, rental or repair of.”

Section 1499.102:

“Maximum Prices for Services: General Provisions. Except as otherwise provided in Maximum Price Regulation No. 165, as amended, the seller’s maximum price for any service to which this maximum Price Regulation No. 165, as amended, is applicable shall be:

(a) The highest price charged during March 1942 (as defined in this section) by the seller—

(1) For the same service.”

Section 1499.102(e-1):

“For the purpose of this Maximum Price Regulation No. 165, as amended, the highest price charged by a seller during March 1942 shall be:

(1) The highest price which a seller charged for a service ‘supplied’ by him during March 1942.”

Section 1499.108(b):

“Base-period records and reports. Every person selling services for which, upon sale by that person, maximum prices are established by Maximum Price Regulation No. 165, as amended, shall; prepare on or before September 1, 1942, to the full extent of all available information and records and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for services supplied during March 1942, for which prices were regularly quoted in that month, together with an appropriate description and identification of such services;

(2) The rate, if any, or the pricing method and charges, if any, regularly used during March 1942; and

A duplicate of this statement shall be filed, on or before September 10, 1942, with the appropriate ‘War Price and Rationing Board of the Office of Price Administration.’ ”

Statement of Facts.

Defendant owns and operates a small radio repair shop in the City of Los Angeles and has been at the same general location for fifteen years [R. 43]. On July 27th, 1942 he filed with the Office of Price Administration a list of his service charges in effect during the month of March 1942. This list was offered in evidence by the plaintiff, admitted as Exhibit 1, and furnishes the basis for the alleged violation.

Reference to said Exhibit 1 shows that defendant’s rates for “time” were \$2.00 per hour with fractions figured at 20¢ for five minutes or fractions thereof, 40¢ for ten

minutes or fractions thereof over five minutes and 50¢ for each fifteen minutes. This covered only time actually spent by the defendant or his employee, and did not include other costs of operations commonly referred to as "overhead." An additional charge of 10¢ to \$2.50 was made to cover these costs of operations.

On March 31st, 1943, B. M. Johnson, a police officer of the City of Los Angeles, took a R. C. A. radio to the defendant's shop for repairs. He had no conversation with the defendant, but talked to "one of his employees" [R. 29]. He signed an order on which the word "Repair" was written in the handwriting of the employee [Exhibit C, R. 45]. The employee was in Ireland at the time of trial and was not available as a witness [R. 43]. All work upon the radio was done by the employee, who turned in to the defendant his time sheets showing the following time spent in repairs:

April 2nd, from 2:10 p. m. to 3:00 p. m., 50 minutes;

April 2nd, from 4:10 p. m. to 5:25 p. m., 1 Hr. 15 minutes; or a total of two hours and five minutes [R. 44].

On April 6th Johnson called for his radio and it was delivered to him by the defendant. The defendant prepared a bill from the employees time sheets for labor and material as follows:

| | |
|--------------------|--------|
| Labor | \$4.70 |
| 1 No. 80 tube | .70 |
| 1 6D6 tube | 1.00 |
| Sales tax on tubes | .05 |
| | <hr/> |
| Total | \$6.45 |

This bill is in evidence as Exhibit 8. Included in the above figure was a charge for fifteen minutes time spent by the defendant in checking the work, checking the statement, taking the merchandise out of stock, making the billing * * * and delivering the radio to the customer. The price charged was the same as charged in March 1942 for similar time and service [R. 44]. There was no claim that the price charged for the tubes furnished was above ceiling.

This was not a repair job in the ordinary course of business, but was a carefully planned scheme by Officers Johnson and Lorenson to make a case against the defendant. Before taking the radio to the defendant's shop a rectifier tube had been purposely "burned out" [R. 32] as the most effective way to make the set inoperative [R. 32].

Defendant's employee was not advised of this. The effect of a "burned out" tube, as disclosed by the evidence, will be more fully referred to under "Argument."

Specifications of Error.

1. The Verdict is contrary to law.
2. The Evidence is insufficient to support the Verdict.
3. The Court erred in denying defendant's Motion for a Directed Verdict of Acquittal on Count 6 at the close of plaintiff's case and at the conclusion of all the evidence.
4. The Court erred in overruling defendant's Motion for a new trial.

ARGUMENT.

I.

The Verdict Is Contrary to Law.

The undisputed testimony disclosed that the Johnson repair job was taken in by the defendant's employee [R. 29] and that all of the work in making the repairs was done by the employee [R. 44]. A charge of 50 cents was made by the defendant for his time in checking the work, etc. [R. 44]. The original time record of the employee for the entire day of April 2nd was produced in Court, marked Exhibit G for identification, but at the Court's suggestion, was not put into the record [R. 44].

It is a well settled rule of law, both in the Federal Courts and in the State Courts of California, that a principal or employer is not liable criminally for the acts of his agent or employee unless he knowingly and intentionally aided and encouraged the criminal act committed.

United States v. Food and Grocery Bureau of Southern California, 43 Fed. Supp. 966 at 971.

In the above case Judge Yankwich cites and quotes from several California and Federal cases, among which are the following:

People v. Doble, 203 Cal. 510, at 511.

"Before one can be convicted of a crime by reason of the acts of his agent, a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law." (Citing *People v. Green*, 22 Cal. App. 45 at 50.)

The same rule is laid down in *Noble v. U. S.*, 284 Fed. 253 at 255, as follows:

“Criminal liability of a principal or master for the acts of his agent or servant does not extend so far as his civil liability. He can not be held criminally liable for the acts of his agent, contrary to his orders and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent’s employment, though he might be liable civilly.” (Citing *Paschen v. U. S.*, 70 F. (2d) 491 at 503.)

Section 205(b) of the Emergency-Price Control Act of 1942 provides that “any person who willfully violates any provision of section 4 of this Act” shall be subject to fine or imprisonment. To be “willful” an act must be done knowingly and intentionally.

Johnson v. U. S., 260 Fed. 783 at 786-787.

Bouvier’s Law Dictionary, 8th Edition, Volume 3, page 3454.

Words and Phrases, Volume 8, page 7468.

There is nothing in the record to indicate that the defendant had any knowledge of the time spent upon the Johnson repair job except the time record turned in by his employee. If there was an overcharge, which we emphatically deny, there is nothing in the record to indicate that the defendant knew it or that he was guilty of any “willful” act.

II.

The Evidence Is Insufficient to Support the Verdict.

Aside from the question of master and servant previously discussed, the evidence wholly fails to sustain the verdict. In order to prove the offense charged in Count 6 of the information, it was incumbent upon the plaintiff to prove that the defendant charged more than his highest prices during March 1942 (Maximum Price Regulation No. 165, as Amended, Section 1499.102(e-1).) As the charge made was based upon "time" spent in making repairs, it was necessary for the plaintiff to show that the "time" charged for was not actually spent. No such proof was offered. Giving the testimony of plaintiff's experts the most favorable interpretation, it disclosed that said "experts" could have located the trouble and repaired the radio in less time. If such evidence were sufficient—and we submit that it was not—it entirely ignores two factors, *viz.*:

(a) The deception practiced by Johnson upon defendant's employee, and

(b) The signed order calling for "Repairs."

The testimony for both the plaintiff and the defendant disclosed that a burned out rectifier tube would indicate to a radio technician many things. Plaintiff's witness, Barrett, testified that

"It could be a shorted power transformer in your transformer set, a shorted filter, filter condenser, the speaker field coil shorted out, the frame, on rare occasions, shorted bypass condenser and also possibly a shorted tube. It might mean any one of these things" [R. 32, 45].

It was also conceded that radio tubes were scarce and that, if there were a short in the set and a new tube were replaced, it would blow out upon turning on the set [R. 32, 33, 45, 46, 49]; that it could also blow out other tubes [R. 49]. Had there been a "short" in the set it probably could have been located much more promptly. However, by reason of the deception practiced, the tube having been intentionally burned out outside of the set, and not by use, defendant's employee was faced with the problem of trying to locate a condition which did not exist. Obviously, this would require a greater amount of time.

Johnson's signed order to "Repair" the radio authorized and justified the employee in exercising his judgment as to what repairs were necessary to put the set in first class condition. While the defendant was deprived of the employee's testimony, the fact that the employee replaced a tube which, according to plaintiff's witness, Barrett, played [R. 31], indicated that it was not efficient as, owing to the shortage of tubes, it would not have been replaced otherwise.

Plaintiff's witness, Barrett, testified that, if he were asked to put a radio set in first class condition and found "two shorted circuits on the 6D6 tube I would have to replace it to put it in first class shape, but you could get some reception out of the set with that short circuit" [R. 34].

Reference to defendant's listed prices [Exhibit 1] shows that he was entitled to charge \$5.40—on 2 hours and 15 minutes of time—to cover "overhead" costs. No charge was made for this item, and the bill rendered was more than 50% below the amount the defendant could have legally charged.

III.

The Court Erred in Denying Defendant's Motion for a Directed Verdict of Acquittal on Count 6 at the Close of Plaintiff's Case and at the Conclusion of All the Evidence.

IV.

The Court Erred in Overruling Defendant's Motion for a New Trial.

The portions of the record in support of the foregoing Specifications of Error are set forth under I and II and a discussion of the evidence would result in repetition. The Court should have protected the defendant's rights either by granting the Motion for a Directed Verdict, or by granting a new trial upon Count 6.

No reference has been made in this brief to the testimony of plaintiff's witnesses, Mary Galton, Mrs. Charles Leake or Walter Kramer. The testimony of these witnesses related to counts in the information on which the defendant was acquitted, and were inserted in the record over our objections. Objection was also made to the inclusion of Government's Exhibits Nos. 2, 3, 4, 5, 6, 7, 10, 11 and Defendant's Exhibits A, B, D, F, H, I and J on the same ground. The testimony of these witnesses and the exhibits referred to were included at the request of the Government and the request was granted by the trial court. We submit that they have no bearing upon the question raised by this appeal and should not be in the record. If we may be pardoned for anticipating the Government's claim, their contention for including this testi-

mony and the exhibits is predicated upon the theory that "other offenses" may be shown to prove intent. We submit, however, that an acquittal upon the counts to which this testimony and the exhibits related furnishes no basis for a claim of materiality.

Conclusion.

It is respectfully submitted that the Judgment should be reversed.

LEE J. MYERS,

Attorney for Appellant.

No. 10621.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

A. M. PEARSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED

OCT 24 1944

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IN THE

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A. M. PEARSON,

Appellant,

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Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

The Information charged that defendant violated the Emergency Price Control Act of 1942, in that he sold service on a radio at a price higher than permitted by Maximum Price Regulation No. 165, issued pursuant to said Act. The offense is alleged to have been committed by defendant in the City of Los Angeles, County of Los Angeles, State of California, and in the Central Division of this district.

A. The District Court had jurisdiction to try the case under the authority of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23, January 30, 1942, 50 U. S. C. A. 925-c).

B. This Court has jurisdiction of the appeal under the provisions of Section 225(a) and (d), Title 28, United States Code.

Questions Involved in the Appeal.

Appellant, in his brief, argues that:

- A. The verdict is contrary to law;
- B. The evidence is insufficient to support the verdict;
- C. The Court erred in denying defendant's motions for a directed verdict; and
- D. The Court erred in overruling defendant's Motion for a New Trial.

Said propositions actually present in different forms the single question as to whether the evidence is sufficient to support the verdict.

The questions arising from the attacks made on the sufficiency of the evidence appear to be:

1. Was the offense committed by appellant or by his employee?
2. Did the appellant charge a higher price for the services rendered than he charged for like services in March, 1942?

ARGUMENT.

I.

The Offense Was in Fact Committed by Appellant Instead of by His Employee.

Appellant contends that the work done on the customer's radio was performed by an employee instead of by himself, and argues that within criminal law, a principal is not bound by the acts of his agent.

This theory has no application to the facts of the case.

The Information charged in essence:

"A. M. Pearson did knowingly, wilfully and unlawfully sell and supply to Lieutenant D. M. Johnson, an individual, service on a certain R. C. A. radio, No. 196679, for the sum of \$6.45; that the sale of said service on the R. C. A. radio at \$6.45 was in excess of the maximum price permitted * * *." [R. 2.]

It is apparent that the gist of the offense was the "overcharge" by defendant. That it was defendant who made the overcharge is clear from the testimony of the customer, B. M. Johnson, whose testimony includes the following:

"I had a conversation with the Defendant, A. M. Pearson at the Sky Pilot Radio Shop * * * I told him I had come for my radio. He told me that he had found two tubes defective and that there was trouble in the oscillating circuit and he had to replace them. I did not say anything. I paid the bill he presented." [Tr. 28-29.]

On cross-examination he testified further to the same transaction with defendant:

“He said he was sorry that it had taken him so long to fix the radio; that he had to fix it himself and worked until ten o’clock the night previous.”
[R. 30.]

Defendant, testifying on this subject, said:

“I did no work on the Johnson radio other than check his work and I watched what he was doing.

By the Court: ‘If he was an experienced technician why did you watch him?’

A. ‘I am supposed to be the manager in the shop. I am supposed to see everything.’” [R. 43.]

The evidence, therefore, sustains the finding of the jury that it was appellant who assessed the overcharge.

The testimony of appellant, to the effect that he watched his technician do the work on the radio, affords a sound basis for the jury’s decision that appellant was familiar enough with the job to have acted understandingly and wilfully in his billing for it. It appears clear that as the gravamen of the offense was wilful making of an overcharge, the question of the employee’s activity is moot. However, if some of the acts of the employee did enter into the *res gestae*, Section 550 of Title 18, U. S. C. covers the situation:

“Principals defined. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.”

II.

Defendant Did Charge a Higher Price for the Services Involved in Count VI, Than He Charged for Like Services in March, 1942.

Appellant's charges for the services for which his customer B. M. Johnson was billed and which Johnson paid are determined by Plaintiff's Exhibit No. 2 (erroneously referred to in the Record as Exhibit 1) which was received in evidence by stipulation. It was stipulated that said exhibit, a letter dated July 25, 1942, constituted defendants' listing of his prices with his War Price and Rationing Board. [R. 21.] Revised Maximum Price Regulation No. 165 (7 Fed. Reg. 4734) required every person selling consumer services subject to the Regulation to so list such prices. Section 1499.108 of said Regulation, covering this subject, is printed as Appendix A.

Page 3 of appellant's said listing contains the following:

“Replacements and repairs

“These standard charges cover service only and include all testing to locate trouble. Prices for materials used are extra and are listed in the Philco Catalog of parts, accessories, tubes and batteries.”

On page 4 is the following:

“Tubes: replacement \$1.00”

The customer had indicated that he wanted a defective tube replaced. The evidence shows that appellant replaced two tubes. The “Labor” item on the bill is \$4.70, instead of \$1.00. The price of the tubes is not in question.

That one dollar (\$1.00) for the "Labor" item on the bill is the ceiling price is established by these words from Plaintiff's Exhibit No. 2:

"These standard charges cover service only and include all testing to locate trouble * * * Tubes: replacement \$1.00."

In the light of the listing, Exhibit No. 2, and the charge of \$4.70 for the services involved in the tube replacement, the jury had an ample basis to find that a charge had been made in excess of that which appellant charged for like service during the base period.

The evidence which brings the services ordered by appellant's customer within the foregoing charge includes the following testimony by Johnson, the customer:

"I set my radio on the counter and another chap came from the back. He asked me if I wanted my radio repaired and what was the matter with it. I told him there was a tube blown out. Mr. Pearson was within a couple of feet of me. I simply told the other party there was a tube blown out in the radio and I would like it fixed. He said, 'All right,' and gave me a slip. Mr. Pearson was still there. I asked when I could pick up the set and he said it would be two or three days as he had a lot of work there. Nothing was said about making repairs."
[R. 29.]

On cross-examination the witness testified further to his conversation with the employee:

"I told him there was a defective tube. I did not tell which one. * * * The employee asked me to sign an order and I signed one. Defendant's Exhibit

‘C’ bears my signature and it is the order I signed when I took the radio to the store. I do not recall the word ‘Repair’ being on it at the time I signed it.” [R. 29-30.] [Cross-examination.]

“I don’t believe ‘repair’ was on it at the time I signed it. There was nothing else on it. It was a blank.” [R. 30.] [Redirect examination.]

Appellant affirmatively urged that he had rendered an additional service, supposedly authorized by the claim that the word “Repair” was on the order form when the customer signed it. Whether the word “Repair” was written in without the customer’s authority was a jury question, and was determined adversely to appellant.

Assuming, but not conceding that the customer authorized a “Repair,” it would have been appellant’s duty to sell him such a “consumer service” rather than to charge for it under a false pretense that such a service had been rendered and the radio repaired. There was ample evidence upon which a jury, even if in doubt as to whether repairs were authorized, or even if in doubt as to whether the listing, Exhibit No. 2, allowed for a charge in excess of \$1.00 for tube testing and installation, could find that no service requiring more than a few minutes’ time had been rendered.

The witness Lorensen testified concerning a check made on the radio before it was taken to appellant’s shop.

“Mr. Barrett, Arthur Sheets and myself checked the radio. Mr. Barrett tested all of the tubes. I marked all of the parts that might be removed. We

played the radio on all stations, then took a No. 80 tube out and damaged it to the extent it would not play. We put the damaged tube back in the radio and checked it. It did not play.” [R. 27.]

Mr. Barrett was a radio technician of over twenty years’ experience. [R. 31.] He testified to testing the radio just before it was sent to appellant’s shop.

“I made a complete and thorough check of the condition of all the component parts of the radio; the tubes, its alignment and its ability to play completely across the dial. Other than a noisy volume control the set was in good condition. The parts in the radio were marked by Captain Lorensen in my presence. The radio was filthy inside. I intentionally burned out an 80-rectifier tube, that was all, and replaced it in the set.” [R. 31.]

Lorensen promptly thereafter gave the set to Johnson. [R. 27.] Johnson immediately took it to appellant. [R. 29.] When it was returned to Johnson by appellant he returned it to Lorensen [R. 27] who took it to the Meyberg Co. where Barrett, an employee of that company, checked it with Lorensen. [R. 28-31.]

Lorensen testified to the examination made at that time as follows:

“When we got the set back everything was the same except there were two tubes—new tubes—in the set. The tube which we purposely blew out was a No. 80 and which I was told was a rectifier tube. This tube had been replaced when I got it back from the Sky Pilot Radio Company. There was also an-

other tube in the set. Otherwise the set was identical with the condition in which it was sent to the Sky Pilot Radio Company.” [R. 28.]

Referring to the same examination Barrett testified:

“I observed that the rectifier tube I had blown out had been replaced and another tube, I believe a 6A7 converter tube, was put in. Other than that, to the best of my knowledge there was nothing else done to it. The volume control was in the same condition as before and the set had not been cleaned at all. No parts had been removed.” [R. 32.]

The witness Barrett also testified that certain checking was indicated when a rectifier tube had failed in a set.

“I would check the power transformer, the filter and the condenser. You check all of these things in one or two operations. One check covers all of these component parts. * * *

“I was connected with a large wholesale house at the time and we had the most modern testing equipment. The small shops did not have this equipment. Without that modern up-to-date equipment they could make that one test. I am positive of that. The type of equipment that would make that test is an ohmmeter.” [R. 33.]

From the evidence it was proper for the jury to believe that appellant did nothing beyond the simplest check, and tube replacement, and the claim of two hours and five minutes of employee's time and fifteen minutes of appellant's time was a mere sham. It is true that appellant denied

this, but a traverse of the Government's evidence raised a question for the jury.

Henderson v. United States, 143 F. (2d) 681
(C. C. A. 9, 1944).

The jury was aided by testimony of appellant's conduct in similar transactions. Mary Galton related a similar transaction. [R. 22.] Mr. Lorenson examined the Galton radio before and after appellant claimed he repaired it and found that:

"I checked all the connections that might have been soldered, all of them were there with their original solder, none of them had been replaced or worked on." [R. 26.] "* * * It was littered with dust, and the dust was still there when I received it back." [R. 26.]

"When I saw the radio after Miss Galton had got it back from the Sky Pilot everything was in the same condition as I originally saw it, except that a new tube had been in to replace the defective rectifier tube which I had put in there purposely." [R. 27.]

Appellant had claimed to the customer, Galton, that he had replaced a part. [R. 23.]

Mrs. Leake testified to an overcharge by appellant. [R. 35.]

Her testimony was, in substance that she asked appellant for an estimate on repairs for her table model radio.

Appellant quoted \$6.00 and later \$14.00 but was told not to do the work. He quoted \$3.50 as a price for having inspected the radio. When the customer refused to pay that sum he raised the service charge to \$6.50 which was finally collected. [R. 35.] Although the facts of these cases were also disputed, there was ample testimony *re* the Galton and Leake transactions from which the jury could have found an intent to systematically overcharge customers.

Appellant contends the Galton and Yeake transactions cannot be considered as evidence of his intent because he was acquitted of counts based upon those particular transactions. This contention is contrary to a line of cases of which *People v. Baker*, 25 Cal. App. (2d) 1 (76 Pac. (2d) 111—1938) is representative. See also *Henderson v. U. S.*, 143 Fed. 681 (C. C. A. 9, 1944). In holding that evidence of similar transactions was admissible to show guilty knowledge and the intent of the defendant and to establish a definite prior design or system, the Court stated:

“It is not essential that such similar transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged.”

Conclusion.

It is respectfully submitted that the judgment of the trial court was not contrary to law and that the evidence produced at the trial of the cause was ample to support appellant's conviction upon Count VI as charged in the Information.

Respectfully submitted,

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JAMES M. CARTER,

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APPENDIX A.

Revised Maximum Price Regulation No. 165 (7 Fed. Reg. 4734):

“Sec. 1499.108. BASE-PERIOD RECORDS AND REPORTS. Every person selling consumer services for which, upon sale by that person, maximum prices are established by Maximum Price Regulation No. 165 shall:

“(a) Preserve for examination by the Office of Price Administration all his existing ‘records’ relating to the prices which he charged or pricing methods which he used for such of those consumer services as he supplied during March 1942, and his offering prices for supply of such consumer services during such month; and

“(b) Prepare on or before September 1, 1942, to the full extent of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

“(1) The highest prices which he charged for consumer services supplied during March 1942 for which prices were regularly quoted in that month;

“(2) The pricing method, if any, regularly used during March 1942; and

“(3) All his customary allowances, discounts, and other price differentials.

“A duplicate of this Statement shall be filed, on or before September 10, 1942, with the ‘appropriate War Price and Rationing Board of the Office of Price Administration.’ ”

